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In the

Supreme Court of the United States

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BILLY RAY TRATREE,

Petitioner,

v.

BP NORTH AMERICA PIPELINES, INC.,

Respondent.

♦

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

♦

PETITION FOR A WRIT OF CERTIORARI

♦

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QUESTIONS PRESENTED

The questions presented are:

Does *Sprint/United Management Co. v. Mendelsohn* impose any limits on a trial court's discretion to exclude "me too" evidence in employment discrimination cases?

Did the district court's *per se* exclusion of evidence about the decisionmaker's disproportionate termination of African-American employees violate this Court's pronouncements in *Sprint/United Management Co. v. Mendelsohn* and constitute an abuse of discretion?

In determining whether to admit "me too" evidence, did the district court incorrectly apply a "quasi-direct" evidence standard, contradicting the established law of this Court?

In excluding evidence of race and age discrimination by BP, including BP's own documents showing that BP targeted older workers for involuntary severance, did the district court abuse its discretion and deprive Tratree of a fair trial?

Does the law of the case doctrine prevent parties like BP from re-litigating issues of law, such as the interpretation of the terms of an unambiguous contract (here, the Collective Bargaining Agreement) that have already been decided by a court of appeals in a prior appeal?

PARTIES TO THE PROCEEDING

Petitioner is Billy Ray Tratree ("Tratree").

Respondent is BP North America Pipelines, Inc., an oil and gas company with its headquarters in Warrenville, Illinois.

RULE 29.6 DISCLOSURE

Respondent BP North America Pipelines, Inc., is an indirect subsidiary of BP.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Billy Ray Tratree ("Tratree") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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OPINIONS BELOW

The opinion of the court of appeals affirming the judgment of the district court (App. 1-12) is unpublished and reported at 2010 WL 3190712 (5th Cir. Aug. 12, 2010). The judgment of the court of appeals (App. 13-14) is unreported. Both are reproduced in the Appendix.

The district court's judgment based on the verdict (App. 32) is unreported and is reproduced in the Appendix.

The 2008 opinion of the Fifth Circuit panel considering the first appeal of this case is unpublished and reported at 277 Fed. App. 390 (5th Cir. 2008). It is reproduced in the Appendix. App. 15-29. The judgment of the court of appeals (App. 30-31) is unreported and reproduced in the Appendix.

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STATEMENT OF JURISDICTION

The court of appeals rendered judgment on August 12, 2010. App. 13-14. This court has jurisdiction under 28 U.S.C. § 1254(1). The district court had

jurisdiction under 28 U.S.C. § 1331. The district court had federal jurisdiction because Tratree's claims arise under federal law, specifically 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act (ADEA). App. 33-68.

♦

STATUTES INVOLVED

The following statutory provisions are involved and are reproduced in the Appendix:

42 U.S.C. § 2000e-2 (App. 33-43)
29 U.S.C. § 623 (App. 44-67)
42 U.S.C. § 1981 (App. 68)

♦

STATEMENT OF THE CASE

A. Introduction

According to this Court, because employers rarely admit discriminatory animus, employment discrimination cases frequently turn on circumstantial evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (noting that *McDonnell Douglas* framework exists because seldom will there be eyewitness or direct evidence of employer intent or mental processes). Tratree is an African-American who worked for BP and its predecessor for 23 years without a single complaint about his performance. Three months before he was to turn 50 and become eligible for early retirement benefits and

medical benefits for life, Tratree's district manager, who is white, decided to "eliminate" his position in favor of a younger, less senior, less qualified, white man.

In 2008, after the district court erroneously granted summary judgment against Tratree on his race discrimination claims and directed a verdict against Tratree on his age discrimination claims, the Fifth Circuit reversed the judgment of the district court and remanded the case for a new trial. App. 15-29. *Tratree v. BP N. Am. Pipelines, Inc.*, 277 Fed. App. 390 (5th Cir. 2008) (per curiam) (not selected for publication).

On remand, the district court excluded most of the evidence that the Fifth Circuit, in reversing the judgment of the district court and remanding the case for a new trial, found to be relevant and probative of discrimination. This evidence includes testimony from several witnesses that the decisionmaker, Kelly Gleason, had a pattern of firing African-American employees. In fact, the undisputed testimony offered at trial would have established that every person but one terminated by Gleason is African-American; the other is a white female over 40. The evidence also includes BP's own internal documents showing its plan to target retirement-eligible workers, the group that Tratree would have joined three months after his position was "eliminated," for "involuntary severance." App. 69-70. *Tratree*, 277 Fed. App. at 395.

Despite the fact that the Fifth Circuit previously considered this evidence and found it relevant and probative of discrimination, on remand, the district court refused to allow the jury to hear this evidence. In other words, in a race discrimination case where the position of the plaintiff, an African-American, is "eliminated" in favor of a white employee, the jury was not allowed to hear testimony that every person but one fired by the decisionmaker is African-American. Likewise, in an age discrimination case where the plaintiff's position was "eliminated" three months before he was to turn 50 and become eligible for early retirement benefits and medical benefits for life, the jury was not allowed to see BP's own documents showing its plan to target retirement-eligible workers for "involuntary severance."

Not surprisingly, the district court's exclusion of this key circumstantial evidence resulted in an adverse verdict and judgment to Tratree. App. 32. Accordingly, Tratree appealed again.

In an unpublished opinion, and ignoring the fact that the previous panel considered this evidence and found it relevant and probative of discrimination, a different panel of the Fifth Circuit concluded that the district court's blanket exclusion of this evidence did not deprive Tratree of a fair trial. App. 1-12. *Tratree v. BP N. Am. Pipelines, Inc.*, No. 09-20472, 2010 WL 3190712 (5th Cir. Aug. 12, 2010) (per curiam) (not selected for publication).

In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), this Court held that the blanket exclusion of "me too" evidence is inconsistent with a plaintiff's right to prove his case by circumstantial evidence. *Id.* at 387 ("[H]ad the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion."). Despite *Mendelsohn's* prohibition of the *per se* exclusion of "me too" evidence, however, commentators have noted that lower courts remain confused about the standards for admission of "me too" evidence. *See e.g.*, Nicholas C. Soltman, *What About (Me Too)? The Case for Admitting Evidence of Discrimination Against Nonparties*, 76 U. CHI. L. REV. 1875 (2009); Mitchell H. Rubinstein, *The Significance of Sprint/United Management Co. v. Mendelsohn: A Reply to Professors Gregory and Segunda*, 102 NORTHWESTERN UNIV. L. REV. 387 (2008) ("As Professor Gregory and I both noted, post-*Sprint* lower courts are already divided over how to treat 'me too' evidence. The Court must take up this issue again – preferably soon – if it is to prevent a morass of unnecessary litigation.").

This case presents an opportunity for this Court to provide more clearly defined guideposts for the admissibility of such evidence.

B. Factual background.

1. Tratree worked for BP for 23 years without complaint.

Tratree started working for Amoco Pipeline Company ("Amoco"), BP's predecessor, in 1978. When Amoco and BP merged in 1999, he became an employee of BP. From 1995 to 2001, Tratree was a "Measurement Specialist I," tasked with making sure oil kept moving through the section of pipeline running from Mexia to BP's Texas City refinery. During Tratree's 23 years of service to the company, BP never had a single complaint about his performance. Three months before Tratree was to turn 50 and become eligible for early retirement benefits and retiree medical benefits, i.e., medical benefits for life, without any advanced warning, BP informed Tratree it was "eliminating" his position.

2. BP "eliminated" Tratree's position in favor of a younger, white man.

Tratree's district manager, Kelly Gleason, who is white, made the decision to "eliminate" Tratree's position. After Tratree's position was eliminated, Tratree's work continued to be performed by Grayson Williams, a younger, white coworker who had less seniority than Tratree.

Although Gleason testified that he made the decision to "eliminate" Tratree's position because BP was decommissioning the line on which Tratree worked, the line was *never* decommissioned but

continued to operate for years after Tratree's position was "eliminated." In fact, although BP sold the line several years after Tratree's position was "eliminated," the line is still in operation today.

3. The "me too" evidence at issue on the race discrimination claims.

The district court excluded evidence from Tratree and two other African-American witnesses who worked under Kelly Gleason, the same person who made the decision to "eliminate" Tratree's position in favor of a younger, white man, that:

- Gleason fired African-Americans disproportionately to whites;
- Every employee but one terminated by Gleason is African-American (the other is a white female over 40);
- Gleason never hired an African-American; and
- There was a culture of discrimination against blacks at BP in Gleason's district during the time period Gleason made the decision to "eliminate" Tratree's position.

App. 1-12. *Tratree*, 2010 WL 3190712, at *3; App. 15-29. *Tratree*, 277 Fed. App. at 395; App. 72-77, 79-82, 87-89, 95-102.

4. Multi-skilling and re-classifications

In 1996, Amoco started a company-wide "multi-skilling" program designed to train employees to perform a wider variety of functions and therefore reduce the size of the workforce. App. 1-12; *Tratree*, 277 Fed. App. at 391. After BP and Amoco merged in 1999, BP continued the "multi-skilling" program. In fact, as of the 2009 trial, the multi-skilling program was still in effect.

Part of the "multi-skilling" program included a goal to reduce its workforce by 100 people, including 64 people ages "*50*" and up in the "*retirement eligible population,*" the group that Tratree would have joined when he turned 50 in December of 2001. App. 69, PX 54. The company predicted that "[v]oluntary severance is not likely to reach our reduction target," so it looked for involuntary severance options. App. 70, PX 57 ("How do we get the rest? And when?").

After BP merged with Amoco in 1999, BP continued Amoco's policy of discriminating against employees in the "retirement eligible population." Gleason, Tratree's district manager and the person who decided to "eliminate" Tratree's job, testified that "[t]here was extreme concern that under BP it was going to be very difficult to make age 50 and get your retirement benefits." Gleason further testified that in early 2001, before Tratree's position was "eliminated," Lee Edwards, then president of BP Amoco, remarked at a company meeting that "BP discriminates against age." App. 15-29; *Tratree*, 277 Fed. App. at 391, 395.

Gleason testified that at that meeting, most of the people in attendance were 45 to 50 years old. Edwards commented, "Yeah, I'm kind of surprised to see the number of you guys here that are at your age." He further stated, "Let's face it. BP does, in fact, discriminate against age. You only need to look at BP's organization to get a feel for that."

C. The district court made blanket exclusions of "me too" evidence, violating this Court's opinion in *Sprint/United Management Co. v. Mendelsohn* and erroneously applying a "quasi-direct" evidence standard.

At the second trial, the district court excluded most of the evidence that the Fifth Circuit previously found relevant and probative of discrimination, including evidence of other instances of race discrimination during Gleason's tenure and evidence of the culture of race discrimination at BP. App. 1-12. *Tratree*, 2010 WL 3190712, at *3; App. 15-29. *Tratree*, 277 Fed. App. at 395. The district court also excluded the "multi-skilling" documents evidencing BP's intent to target retirement-eligible workers for involuntary severance. App. 69, PX 54; App. 70, PX 57 ("How do we get the rest? And when?").

REASONS FOR GRANTING THE PETITION

I. The Court should grant certiorari to address the split of authority among lower courts regarding how to apply the standards articulated by this Court in *Sprint/United Management Co. v. Mendelsohn.*

For years, lower courts have applied different legal standards to the admissibility of "me too" testimony, i.e., evidence of bias or discrimination toward employees other than the employment discrimination plaintiff. *See e.g.*, Nicholas C. Soltman, *What About (Me Too)? The Case for Admitting Evidence of Discrimination Against Nonparties*, 76 U. CHI. L. REV. 1875 (2009). Notwithstanding the Court's ruling in *Mendelsohn*, commentators have observed that "trial courts continue to produce inconsistent opinions on the admissibility of 'me too' evidence." *Id.* at 1895 n.133; *see also* Mitchell H. Rubinstein, *The Significance of Sprint/United Management Co. v. Mendelsohn: A Reply to Professors Gregory and Segunda*, 102 NORTHWESTERN UNIV. L. REV. 387, 390 (2008) ("As Professor Gregory and I both noted, ***post-Sprint lower courts are already divided*** over how to treat 'me too' evidence. The Court must take up this issue again – preferably soon – if it is to prevent a morass of unnecessary litigation.") (emphasis added).

Even before *Mendelsohn*, some circuits completely excluded "me too" evidence, while others completely allowed it. *See e.g.*, Soltman, *What About (Me Too)? The Case for Admitting Evidence of Discrimination Against Nonparties*, 76 U. CHI. L. REV. at 1884-87

(identifying the Fifth and Second Circuits as circuits that adopted *per se* rule against "me too" evidence).

This case presents a unique opportunity for the Court to resolve the split of authority among lower courts regarding how to apply the standards articulated by the Court in *Mendelsohn*.

A. Evidence of decisionmaker bias toward employees in the same protected class as plaintiff should generally be admitted into evidence.

This case provides the Court a stark set of circumstances involving "me too" evidence. Specifically, the district court excluded ***all*** evidence pertaining to the termination of African-American employees ***by the decisionmaker*** before he made the decision to "eliminate" the position of an African-American in favor of a younger, white employee.

In *Mendelsohn*, an ADEA case, the Court granted certiorari to "determine whether, in an employment discrimination action, the Federal Rules require admission of testimony by non-parties alleging discrimination at the hands of persons who played ***no role*** in the adverse employment decision challenged by the plaintiff." *Mendelsohn*, 552 U.S. at 380 (emphasis added).

In this case, by contrast, the district court excluded evidence that Gleason, the sole decisionmaker, had a pattern of discriminating against

African-American employees, including disproportionately firing African-Americans, not hiring them, and allowing a culture of discrimination against African-Americans in his district. Specifically, the district court excluded:

> (1) testimony of former BP employee Herman Johns, who worked in the same district as Tratree under district manager Kelly Gleason, that Gleason fired African-Americans disproportionately to whites. App. 79-82.
>
> (2) testimony of former BP employee Darrel Jackson, who worked in the same district as Tratree under district manager Kelly Gleason, that there was a culture of discrimination against African-Americans under Gleason. App. 72-77, 96-98.
>
> (3) testimony by Tratree that he was treated differently from Williams and other white coworkers and that his district manager, Kelly Gleason, never hired African-Americans and fired African-Americans disproportionately to whites. App. 95-102.

Because discrimination is so difficult to prove, and because courts allow plaintiffs to prove discrimination by circumstantial evidence, and because testimony of decisionmaker bias toward employees in the same protected class as plaintiff is probative of discriminatory animus, the Court should clarify the law in this area to provide that such evidence is generally admissible.

B. The Court should reject the district court's erroneous conclusion that an employment-discrimination plaintiff must prove his case by "quasi-direct" evidence.

According to this Court, in employment discrimination cases, plaintiffs are entitled to prove their case by circumstantial rather than direct evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (noting that *McDonnell Douglas* framework exists because seldom will there be eyewitness or direct evidence of employer intent or mental processes). Here, the district court admitted testimony of certain of Gleason's co-workers that they never heard Gleason utter racist remarks, as if to suggest that the *absence* of such evidence *disproves* Tratree's claims. This approach, which suggests that plaintiff must prove his case by "quasi-direct" evidence, turns the burden-shifting framework on its head, directly contradicting this Court's jurisprudence in *Reeves* and *McDonnell Douglas*. There is no requirement that plaintiff prove his case by "quasi-direct" evidence.

Moreover, in this case, not only did the lower court hold the lack of "quasi-direct" evidence against Tratree, but the factfinder was not allowed to weigh testimony that certain of Gleason's co-workers never heard him utter racist remarks against undisputed evidence that Gleason disproportionately fired African-Americans. How can a plaintiff hope to prevail on a claim of discrimination if the only circumstantial evidence admitted favors defendant

and all circumstantial evidence favoring plaintiff is excluded? The jurisprudence of this Court in *Reeves* and *McDonnell* does not support such a one-sided admission of circumstantial evidence.

Plaintiffs can find no other opinion even suggesting that a plaintiff must prove his case by quasi-direct evidence. In *Reeves*, the Court reversed the Fifth Circuit's erroneous conclusion that to prevail on their claims, employment-discrimination plaintiffs are required to prove more than pretext ("pretext plus"). *Reeves*, 530 U.S. at 146-48. Granting certiorari in this case would provide the Court an opportunity to clarify that there is no requirement that an employment-discrimination plaintiff present "quasi-direct" evidence of a decisionmaker's discriminatory animus and that where the defendant is allowed to present evidence that a decisionmaker has *not* exhibited discriminatory animus, the plaintiff should be allowed to present evidence to the contrary. In fact, because actions speak louder than words, "me too" evidence that a decisionmaker disproportionately fired employees in the same protective class may be *more* probative than evidence that a decisionmaker did not utter discriminatory remarks in front of certain coworkers. This case presents the Court an opportunity to clarify that "me too" evidence should be admitted when it provides circumstantial evidence of a decisionmaker's intent to discriminate and that there is no requirement that a plaintiff prove his case by "quasi-direct" evidence.

C. Relevant "me too" evidence should be allowed to prove a culture of discrimination at the employer.

The district court also excluded evidence tending to show a culture of race discrimination at BP. Specifically, Tratree offered evidence that, while he worked under Gleason, his coworkers "used racial epithets in his presence, told racist jokes, and threatened him" and that Tratree's district manager "granted more training opportunities to whites, never hired African-Americans, and consistently fired African-Americans more often than whites." App. 80-81, 82, 87-89, 95-102. In the 2000 to 2001 time frame, Tratree complained to his supervisor, Roy Bowden, about his coworkers' use of the "n" word and racist jokes, but the racial slurs continued, and the atmosphere never changed. App. 95-100.

In the first appeal of this case, the Fifth Circuit found this evidence relevant and probative of discrimination. App. 15-29. *Tratree*, 277 Fed. App. at 394. At the second trial of this case, however, the district court *excluded* evidence that Tratree's "coworkers used racial epithets in his presence, told racist jokes, and threatened him" and that "his district manager granted more training opportunities to whites, never hired African-Americans, and consistently fired African-Americans more often than whites." App. 80-81, 82, 87-99, 97-100.

BP successfully – albeit erroneously – persuaded the district court that evidence of a culture of

discrimination outside the statutory limitations period (300 days from the date BP "eliminated" Tratree's position in September of 2001) should be *per se* excluded. App. 87-89. However, neither the jurisprudence of this Court nor the jurisprudence of the Fifth Circuit supports this argument, which directly contradicts the law of the Fifth Circuit as established in the 2008 Tratree opinion. App. 15-29. *Tratree*, 277 Fed. App. at 394.

This evidence, as well as the "me too" evidence described above, makes it more likely than not that discrimination was the cause of the decision to eliminate Tratree's position. *See e.g., Polanco v. City of Austin*, 78 F.3d 968, 979-80 (5th Cir. 1996) (evidence of Austin Police Department's hostile attitude toward Hispanics, including quality of homicide investigations involving Hispanic victims and referring to cases involving Hispanic victims as "misdemeanor murders," was probative of whether Polanco's termination was because of his nationality); *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) ("[B]ackground evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive."); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103-04 (8th Cir. 1988) ("It defies common sense to say, as [the employer] implies, that evidence of an employer's discriminatory treatment of black customers might not have some bearing on the question of the same employer's motive in discharging a black employee."). As noted by the Eighth Circuit, a climate

of race or age bias is "indeed relevant to proving a particular instance of discrimination" and should be "freely admitted at trial." *Phillip*, 945 F.2d at 1056. As noted by the Fifth Circuit in *Polanco*, evidence of an employer's "pervasive discriminatory attitude" is probative as to whether a plaintiff was terminated because of discrimination. *Polanco*, 78 F.3d at 979-80. This is precisely the type of evidence Tratree offered, yet the Fifth Circuit affirmed the district court's exclusion of this evidence, creating a split of authority between the Fifth Circuit and the Eighth Circuit. *Compare Estes*, 856 F.2d at 1102-03, *and Phillip*, 945 F.2d at 1056, *with* App. 1-12; *Tratree*, 2010 WL 3190712, at *3.

II. The Court should grant certiorari because the lower courts failed to comply with this Court's ruling in *Sprint/United Management Co. v. Mendelsohn* and deprived Tratree of a fair trial.

The Court wrote in *Mendelsohn* that "had the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion." *Mendelsohn*, 552 U.S. at 387. In the context of "me too" evidence, a *per se* rule refers to a blanket ban on evidence from nonparties about bias or discriminatory animus, an approach some lower courts have adopted through the years. *See e.g.*, Soltman, *What About (Me Too)? The Case for Admitting Evidence of Discrimination Against Nonparties*, 76 U. CHI. L.

REV. at 1884-87 (identifying Fifth and Second Circuits as circuits that adopted a *per se* rule against "me too" evidence). In *Mendelsohn*, the Court found that the Tenth Circuit erroneously concluded that the district court had applied a *per se* or blanket rule in that case.

In this case, by contrast, the district court excluded on a blanket, *per se* basis, all of the evidence of the decisionmaker's record of disproportionately firing African-Americans. App. 95-102, 79-82.

Had the district court followed the mandates of *Mendelsohn,* it would have determined "how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Mendelsohn*, 552 U.S. at 388. Tratree's theory of the case was that Gleason's decision to "eliminate" his position in favor of a younger, white man was motivated by racial and age-based animus. Yet the district court excluded evidence making Tratree's theory of the case more likely than not – including evidence that Gleason had a pattern of terminating African-American employees.

In *Estes*, the Eighth Circuit wrote that it "defies common sense to say, as [the employer] implies, that evidence of an employer's discriminatory treatment of black customers might not have some bearing on the question of the same employer's motive in discharging a black employee." *Estes*, 856 F.2d at 1103-04. The link between how an employer treats other African-American employees and the African-American

employee charging the company with race discrimination is even more direct.

The prejudice resulting from these evidentiary rulings is perhaps most clearly manifested in BP's closing argument:

> "And, so, let's talk about the discrimination claims. Let's talk about race first because ***the only evidence of racial discrimination in this case is the fact that Mr. Tratree is Black***. That's it."

App. 127 (emphasis added). Because other instances of race discrimination at BP are probative of a culture of discrimination, they are relevant to Tratree's claims. Here, the exclusion of the crushing majority of Tratree's evidence of other race discrimination or culture of discrimination would likely have influenced the jury, and reversal is therefore warranted.

The district court also excluded evidence related to Tratree's age discrimination claims, including evidence that "the 'multi-skilling' program started by Amoco and continued by BP had an internal goal of discriminating against retirement eligible workers." App. 15-29; *Tratree*, 277 Fed. App. at 395. Though the first panel of the Fifth Circuit found this evidence relevant and probative of age discrimination, at the second trial of this case, the district court *excluded* evidence that "the 'multi-skilling' program started by Amoco and continued by BP had an internal goal of discriminating against retirement eligible workers." App. 15-29; *Tratree*, 277 Fed. App. at 395.

Specifically, the district court excluded plaintiff's exhibits showing the company's plan to target employees ages "50" and up in the "retirement eligible population" for involuntary severance. App. 69, PX 54; App. 70, PX 57 ("How do we get the rest? And when?"); App. 92-94. That is the very group Tratree would have joined in December of 2001, three months after his position was "eliminated."

Because this evidence is relevant to Tratree's age discrimination claims and tends to show that BP's proffered reason for "eliminating" Tratree's job is pretextual, and because the Fifth Circuit had already found this evidence probative, in excluding this circumstantial evidence of discrimination, the district court abused its discretion, adversely affecting Tratree's substantial rights. While the district court did admit some evidence supporting Tratree's age discrimination claim, including testimony that the CEO of BP, Lee Edwards, stated that the company has a policy of discriminating against age, such evidence, combined with BP's own internal documents showing the intent to target retirement-eligible workers for involuntary severance, makes Tratree's claims of discrimination much more compelling. Accordingly, the exclusion of such documents impaired Tratree's rights. Accordingly, Tratree asks this Court to grant certiorari, reverse the Fifth Circuit's judgment, and remand this case for a new trial.

III. The Court should grant certiorari to clarify the law of the case doctrine regarding admissible evidence and jury instructions in remanded cases.

According to the law of the case doctrine, when an appellate court decides a question of law, "that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983).

In this case, however, the district court and the second panel of the Fifth Circuit in 2010 completely disregarded the determinations made by the first Fifth Circuit panel in 2008.

The collective bargaining agreement (CBA) at issue in this case is unambiguous. It provides that an employee whose job is eliminated may "bump" any person with less seniority for whose job he is qualified "within the *new or old* classification." App. 15-19. *Tratree*, 277 Fed. App. at 392 n.1 (emphasis added). The CBA further defines "qualified" as "[p]ossession of standards essential to the workmanlike performance of a given job." App. 15-29. *See Tratree*, 277 Fed. App. at 394. Despite this unambiguous language, throughout this case, BP has claimed that employees whose jobs are classified under the "old" classifications could ***never*** bump employees whose jobs are classified under the "new" classifications, even if they possessed the standards essential to the workmanlike performance of the job.

In 2008, the Fifth Circuit explicitly rejected BP's contention. The Court held:

> First, the CBA does not indicate that new classification employees will be favored over old classification employees when BP considers which positions to eliminate. Thus, BP's argument that it has a policy of favoring new over old classifications is not grounded in written company policy and is belied by the terms of the CBA. **Under the CBA, senior employees in old classifications retain the ability to "bump" employees in new classifications so long as the senior employee is qualified for the position held by the less-senior employee.** Although this is most relevant to the issue of whether BP provided the correct "bumping" options to Tratree, it also supports an inference that **when BP eliminated Tratree's position and refused to allow Tratree to "bump" Williams, it acted contrary to the terms and spirit of the CBA that BP shall not favor employees in new classifications over those with old classifications.**

App. 15-29. *Tratree*, 277 Fed. App. at 394 (emphasis added).

At the second trial of this case, over Tratree's repeated objections, the district court permitted BP to introduce parol evidence regarding this unambiguous provision of the CBA. App. 84, 103-112; *see also* 116.

Because the Fifth Circuit had already determined the meaning of the provision, making it the

law of the case, and because parol evidence is inadmissible to create an ambiguity, the district court erred in admitting this evidence. *Petrobras America Inc. v. Union Oil Co.*, 177 Fed. App. 460, 461-62 (5th Cir. 2006) (parol evidence was inadmissible to prove parties had antecedent or contemporaneous overarching agreement granting plaintiff additional rights in consideration for drilling test well).

Further, because Tratree's failure to sign the "bump sheet" was a primary theme of BP's defense, and because the jury was erroneously led to believe that the "bump sheet" was correct, this error substantially prejudiced Tratree's right to a fair trial. App. 126 ("Mr. Tratree decided not to sign his bump sheet. We don't know why. We'll probably never know why. It wasn't anyone at BP that caused him not to sign his bump sheet, and BP is not responsible for the fact that Mr. Tratree left his job by failing to sign his bump sheet."). Accordingly, Tratree asks this Court to reverse the Fifth Circuit's judgment ordering that Tratree take nothing and remand this case for a new trial.

In addition, the district court refused Tratree's request that the jury be instructed as to the correct meaning of this unambiguous provision of the CBA. App. 129, Instruction No. 8; App. 130-31, Instruction No. 8; App. 117-20, 121-23. Because this omission made the charge to the jury erroneous, Tratree timely and properly objected to the error which unfairly prejudiced the jury, and Tratree requested alternative instructions that would have remedied the error, a

new trial is warranted. *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1281 (Fed. Cir. 2000). These instructions were supported by the evidence and were necessary to assist the jury in understanding that the "bump sheet" violated the CBA, which, as the Fifth Circuit has already stated, directly bears on whether BP discriminated against Tratree because of his age or race. App. 15-29. *Tratree*, 277 Fed. App. at 394. The instructions were especially necessary in light of the district court's erroneous decision to admit parol evidence regarding an unambiguous provision of the CBA, which led the jury to believe that the "bump sheet" was correct.

The Fifth Circuit's approach to the law of the case doctrine in this case conflicts with the Eighth Circuit and the Eleventh Circuit. *See Maxfield v. Cintas Corp.*, 487 F.3d 1132, 1135 (8th Cir. 2007); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1098-99 (11th Cir. 1987); *see also Crocker v. Piedmont Aviation*, 49 F.3d 735, 739-40 (D.C. Cir. 1995).

Specifically, these circuits have refused to allow the re-litigation of matters in employment discrimination cases resolved in prior appeals. In *Maxfield*, the Eight Circuit reversed a second granting of summary judgment based on "the same arguments" rejected in the first appeal and a record that was "not substantially different from that considered by the court" previously. *Maxfield*, 487 F.3d at 1135. Similarly, in *Lindsey*, the Eleventh Circuit reversed a case in which the district court resurrected testimony

discredited in a prior appeal, thereby violating the prior panel's mandate. *Lindsey*, 810 F.2d at 1099.

Because the district court allowed BP to present parol evidence regarding the meaning of the unambiguous terms of the CBA, in violation of the Fifth's Circuit's determination in 2008, and because the Fifth Circuit's refusal to correct such error constitutes a misapplication of the law of the case doctrine and creates a split of authority between the Fifth, Eighth, and Eleventh Circuits, Tratree requests that the Court grant this petition for writ of certiori to clarify how the law of the case doctrine applies to remanded cases.

◆

CONCLUSION

For all of these reasons, Tratree requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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Dated:
November 10, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20472

BILLY RAY TRATREE,

Plaintiff-Appellant

v.

BP NORTH AMERICA PIPELINES, INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-cv-954

(Filed Aug. 12, 2010)

Before JOLLY and GARZA, Circuit Judges, and STARRETT, District Judge.*

PER CURIAM:**

* District Judge, United States District Court for the Southern District of Mississippi, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR R. 47.5.4.

Billy Ray Tratree appeals a jury verdict in BP's favor on Tratree's Title VII race discrimination and Age Discrimination in Employment Act (ADEA) claims. We conclude that Tratree's evidentiary challenges fail, and we affirm the jury's verdict.

I

Billy Ray Tratree, who is African-American, worked for Amoco Pipeline Company (Amoco) starting in 1978, and continued working for BP when BP and Amoco merged in 1999. Beginning in 1995, he was a "Measurement Specialist I," and he worked on a section of BP pipeline between Mexia and Texas City, Texas. In 2001, BP decided to eliminate one of the two positions on that section of pipeline, and Kelly Gleason, the district manager, chose to eliminate Tratree's job instead of that of his coworker, Grayson Williams, who is a white male six years younger than Tratree and who was less senior than Tratree. Williams was classified as a "Field Specialist II," but performed approximately the same work as Tratree.[1] When he was terminated, Tratree was 49 years old

[1] In 1996, Amoco started a "multi-skilling" program, later continued by BP, that created new job classifications. Employees were encouraged to become classified under the new system by performing training for the new positions, but they were not required to do so. Tratree was a Measurement Specialist I under the old system and was qualified to become a Field Specialist III, but chose not to change his classification. Williams completed his training and became a Field Specialist II (a level above Field Specialist III) in 2001.

and was three months away from turning 50, when he would have been eligible to retire.

Tratree's Union (the Oil, Chemical, and Atomic Workers International, now "PACE") has a collective bargaining agreement (CBA) with BP. The CBA includes a process called "bumping," whereby a Union member whose job position has been eliminated has the right to take the position of a less senior employee if the terminated employee is qualified for the position, thus bumping the less senior employee out of his job. The employee who exercises his bumping rights retains his pay level, benefits, and seniority rights in the new position. The CBA states that employees may bump other employees in either new or old classifications. However, BP presented evidence that according to its "bumping guidelines," as understood by both BP and the Union, an employee with a position in the new classification system, such as Williams, could not be bumped by an employee classified under the old system, such as Tratree.

When his position was eliminated, Tratree was sent a bumping sheet, which listed the less senior employees whose positions Tratree had the option to take. The bumping sheet did not include the option of bumping Williams. According to the CBA, Tratree had five business days to sign the sheet before he would be terminated. He refused to sign it and instead complained that his bumping options were incorrect because they did not include the option to bump Williams. As a result of his failure to sign the sheet, Tratree was let go on September 27, 2001.

Tratree sued BP in November 2002, alleging race discrimination and retaliation under Title VII and §1981, and age discrimination and retaliation under the ADEA. The district court granted BP's motion for summary judgment on the Title VII and §1981 claims and on the ADEA failure-to-promote claim. After Tratree presented his case on the ADEA discrimination and retaliation claims, the district court granted BP's motion for judgment as a matter of law. Tratree appealed the district court's orders of summary judgment and judgment as a matter of law, and this court reversed the grant of summary judgment on his race discrimination claims and reversed the judgment as a matter of law on the age discrimination claims, affirming the remaining judgments. *Tratree v. BP North American Pipelines (Tratree I)*, 277 F. App'x 390, 2008 WL 1924171 (5th Cir. 2008). On remand, the jury returned a verdict for BP on both claims.

II

Tratree appeals the verdict based on several of the district court's evidentiary rulings. The district court's evidentiary rulings are reviewed for an abuse of discretion. *Price v. Rosiek Const. Co.*, 509 F.3d 704, 707 (5th Cir. 2007). Even if an abuse of discretion occurred, the ruling will be affirmed if the error was harmless; that is, if it did not affect the substantial rights of the complaining party. *Id.* "An error does not affect substantial rights if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a slight effect on its

verdict." *Id.* at 707-08 (quoting *Kelly v. Boeing Petroleum Svcs., Inc.*, 61 F.3d 350, 351 (5th Cir. 1995)).

A

Tratree challenges the district court's exclusion of evidence relating to his racial discrimination claim, which he argues would have demonstrated a "culture of discrimination" under Gleason. There were three types of excluded evidence: statistical evidence about the number of black employees and managers at BP, testimony from Tratree and other BP employees about differential treatment of African-Americans in Gleason's district, and testimony about racial epithets uttered by Tratree's coworkers in the 1980s.

Tratree argues that the law-of-the-case doctrine applies to prevent the district court from excluding any of this evidence because this court, in Tratree's prior appeal, indicated that "culture of discrimination" evidence was relevant to his claim. *See Tratree I*, 277 F. App'x at 394. "The law of the case doctrine, as formulated in this circuit, generally precludes reexamination of issues of law or fact decided on appeal." *Alpha/Omega Ins. Svcs. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (quotation marks omitted). However, the doctrine "applies only to those issues that were actually decided, rather than all questions in the case that might have been decided but were not." *Id.* Issues may be deemed to have been implicitly decided if they were "fully briefed to the appellate court and . . . necessary predicates to

the [court's] ability to address the issue or issues specifically discussed." *Id.* (quoting *In re Felt,* 255 F.3d 220, 225 (5th Cir. 2001)). Tratree's law-of-the-case argument fails because the parties did not brief evidentiary issues in the prior appeal; the specific evidence at issue here was not before the court; and the court did not decide any issues of admissibility.

Tratree's challenge to the exclusion of the statistical evidence fails. "[G]ross statistical disparities may be probative of discriminatory intent, motive, or purpose," but percentages that "fail to draw a comparison between the percentage of minorities in the workforce and the percentage of qualified minorities in the relevant candidate pool" are less convincing. *Scales v. Slater,* 181 F.3d 703, 709 n.5 (5th Cir. 1992). Tratree did not offer any comparison that would put the percentages he offered in context – they were simply raw percentages of black employees and managers at BP. Given the lack of comparative statistics that would put the percentages in perspective by reference to the number of African-Americans in the relevant applicant pool, the district court's exclusion was not an abuse of discretion. The percentages alone could not have been very probative of discrimination, if at all, and any probative value would have been outweighed by the danger of unfair prejudice. *See* FED. R. EVID. 403. Regardless, we are convinced that the raw percentages could not have had more than a slight impact on the jury's verdict, so any error would have been harmless.

Tratree's challenges to the district court's exclusion of testimony about differential treatment under Gleason also fail. Evidence about a discriminatory culture at BP or discriminatory acts of the decision-makers who terminated Tratree would certainly have been relevant and probative. *See, e.g., Polanco v. City of Austin,* 78 F.3d 968, 979-80 (5th Cir. 1996); *Palasota v. Haggar Clothing* Co., 342 F.3d 569, 577 (5th Cir. 2003). However, the district court did not exclude the testimony as generally irrelevant. Instead, after questioning one of the witnesses outside of the jury's hearing, and examining the deposition testimony of the other witness, the district court excluded the testimony because the witnesses either could not remember specific facts that would have made the past incidents relevant to Tratree's claim (such as the circumstances surrounding Gleason's firing of other African-Americans), or would have testified about experiences that were too far removed from Gleason himself (for instance, one witness believed that a different supervisor acted through Gleason via "the art of Satan"). The court conducted a "careful, subjective consideration of the relevance of each proffered witness's testimony" and did not abuse its discretion in excluding the testimony. *See Kelly,* 61 F.3d at 359.

Further, the district court did not abuse its discretion in excluding testimony regarding racial epithets in the 1980s. Tratree's coworkers, supervisors, and managers had changed several times since the 1980s, so any minimal probative value of the 1980s

evidence would have been outweighed by the danger of unfair prejudice. *See* FED. R. EVID. 403. Tratree argues that even if the evidence from the 1980s was too far removed in time to be probative of the culture of discrimination in 2001, it was probative of why Tratree did not sign the bump sheet, which he contends he refused to sign in part because he was "fed up" with being discriminated against at B.P. However, Tratree also testified that he did not sign the bump sheet because his union chair advised him not to, and that he would have signed it had his union chair advised him to do so. The union chair, to the contrary, testified that he did in fact advise Tratree to sign the bump sheet. The jury either believed the union chair's testimony, or else concluded that Tratree's reasons for signing the bump sheet were irrelevant to the question of discrimination, so the exclusion of the 1980s evidence was harmless.

Finally, Tratree contends that these evidentiary rulings combined caused the "crushing majority" of his circumstantial evidence of race discrimination to be excluded, citing *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 424 (5th Cir. 2006). In *Brazos,* the erroneous exclusion of evidence was reversible because it was "not merely cumulative"; no evidence on the issue had been placed before the jury. *Id.* Here, on the other hand, Tratree was able to present evidence regarding racial animus and discrimination, including that he was subject to racial slurs, that his supervisors did not protect him from the racial slurs, and that his supervisors gave

training priority to his white coworker. Even if any of the other racial discrimination evidence was excluded improperly, Tratree's "crushing majority" argument fails, and the combined exclusions were harmless.

B

Next, Tratree argues that the district court improperly excluded evidence of age discrimination. He challenges the exclusion of several exhibits relating to Amoco's, and later, BP's, "multi-skilling" program, which he says would have shown that the program had the goal of discriminating against retirement-eligible workers. However, the exhibits were properly excluded because they were not relevant to age discrimination. They relate to overall severance targets (voluntary and involuntary) and do not mention targeting older or retirement-eligible employees for involuntary severance.

Tratree also challenges the exclusion of testimony from an employee that the multi-skilling program continued to operate under BP. The proffered testimony did not address whether the multi-skilling program was discriminatory, and would not have been relevant at all without the multiskilling exhibits, which were properly excluded. The district court did not abuse its discretion in excluding the testimony.

C

Tratree challenges the district court's exclusion of two items of evidence that he argues would have tended to show that BP's proffered reason for terminating Tratree was pretextual.

The court properly excluded testimony from Tratree's supervisor, Bowden, that sometime in 2000, Bowden would not allow Tratree time off to attend his mother's funeral because Bowden believed that Williams was not qualified to relieve Tratree. However, BP's proffered explanation for releasing Tratree focused on his and Williams's formal classifications in 2001, not on their relative skill levels in 2000. Further, Tratree does not brief how the exclusion affected his substantial rights other than to assert that it did. We conclude that the exclusion was not an abuse of discretion, and was in any event harmless.

In addition, the court properly excluded evidence that BP paid large bonuses to Gleason and other district managers for their performance in 2001, which Tratree argues would have rebutted BP's claim that it eliminated Tratree's position because of a "downturn in business in the pipeline" in his region. The bonus evidence was minimally relevant to the overall economic situation of the pipeline; further, Tratree had already presented evidence on the performance of the pipeline and the fact that it continued to operate after he had been terminated, so the bonus evidence would have been cumulative. Any minimal probative value would have been outweighed by the

likelihood of danger of unfair prejudice. *See* FED. R. EVID. 403. The district court did not abuse its discretion, and the exclusion in any event was harmless.

D.

Finally, Tratree challenges the admission of evidence regarding the interpretation of the CBA. The CBA states that an employee whose job is eliminated may bump another employee of less seniority "within the new or old classification," but BP's justification for terminating Tratree instead of Williams was that, according to its usual bumping protocol, employees in old classification positions (like Tratree) could not bump employees in new classification positions (like Williams). Tratree argues that admission of the evidence (and presentation of the issue to the jury) violated the law of the case. In Tratree's prior appeal, this court noted that "BP's argument that it has a policy of favoring new over old classifications is not grounded in written company policy and is belied by the terms of the CBA," which "supports an inference that when BP eliminated Tratree's position and refused to allow Tratree to 'bump' Williams, it acted contrary to the terms and spirit of the CBA that BP shall not favor employees in new classifications over those with old classifications." *Tratree I*, 277 F. App'x at 394. However, this reference to the CBA came as the court was examining all evidence "in the light most favorable to [Tratree], drawing all reasonable inferences in his favor, and disregarding all evidence adverse to him that a jury

would not be required to believe." *Id.* at 393. Therefore, the court's description of the CBA cannot be considered a factual determination that became the law of the case. Further, the CBA's meaning as a matter of law was not before the court. The law of the case doctrine did not prevent BP from introducing evidence on remand that contradicted the *Tratree I* court's description of the CBA and supported BP's proffered explanation for firing Tratree.[2]

III

For the foregoing reasons, the jury verdict and judgment in favor of BP is AFFIRMED.

[2] Tratree also cursorily asserts that admission of the evidence regarding the CBA violated the parol evidence rule. The admission did not violate the parol evidence rule. The evidence regarded both parties' conduct *after* contracting and illustrated a modification to the CBA, agreed to by both the Union and BP.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-20472

D.C. Docket No. 4:03-cv-954

BILLY RAY TRATREE,

Plaintiff-Appellant

v.

BP NORTH AMERICA PIPELINES, INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before JOLLY and GARZA Circuit Judges, and STARRETT, District Judge.*

JUDGMENT

(Filed Aug. 12, 2010)

This cause was considered on the record on appeal and was argued by counsel.

* District Judge of the Southern District of Mississippi, sitting by designation.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-21003

BILLY RAY TRATREE

Plaintiff-Appellant

v.

BP NORTH AMERICA PIPELINES, INC.;
KELLY GLEASON

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CV-954

(Filed May 2, 2008)

Before DAVIS and SOUTHWICK, Circuit Judges, and DRELL, District Judge.*

PER CURIAM:**

* District Judge of the Western District of Louisiana, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

(Continued on following page)

Plaintiff-Appellant Billy Ray Tratree ("Tratree") challenges the dismissal of his employment discrimination suit against Defendant-Appellee BP North American Pipelines, Inc. ("BP") partially by summary judgment and partially by judgment as a matter of law. For the following reasons, we affirm in part and vacate and remand in part.

I.

Tratree started working for Amoco Pipeline Company ("Amoco"), BP's predecessor, in 1978. When Amoco and BP merged in 1999, he became an employee of BP. From 1995 to 2001, Tratree was a "Measurement Specialist I," tasked with making sure oil kept moving through the section of pipeline running from Mexia to Hufsmith, Texas. Tratree's focus was on the section of pipeline running from North Zulch, a middle-point on the pipeline where he was based, to Hufsmith. According to his supervisors and coworkers Tratree was qualified and did good work.

Tratree alleged that during his employment at Amoco and BP he was the victim of race discrimination. Specifically, he claimed that his coworkers used racial epithets and threatened him, that he was responsible for a larger area of pipeline than his white coworkers, that he was forced to work overtime more often than his white coworkers, and that his

except under the limited circumstances set forth in 5TH CIR R. 47.5.4.

district manager granted more training opportunities to whites and consistently fired African-Americans more often than whites. Tratree alleged that he complained to his supervisors about this treatment, but they did nothing.

Tratree also alleged that he was the victim of age discrimination. Tratree's district manager testified that in 2001 Lee Edwards, then president of BP Amoco, remarked at a company meeting that "BP does, in fact, discriminate against age." Also, Tratree presented evidence that a BP personnel representative indicated that Tratree's position was eliminated because of rumors that he was about to retire.

In 1996, Amoco started a "multi-skilling" program designed to train employees to perform a wider variety of functions and therefore reduce the size of the workforce. The "multi-skilling" program created new job classifications. Under the new classification system, Tratree could have trained to become a "Field Specialist." Employees such as Tratree were not required to give up their old classifications and train for new designations. If Tratree had accepted classification under the new system, he would have received a lower pay rate. Although Tratree was fully qualified as a Field Specialist III, he elected to retain his old designation as Measurement Specialist I. To elevate to the next level, Field Specialist II, Tratree was required to get on-the-job training and a "final check-off" during regularly scheduled work hours. Tratree alleged that Grayson Williams ("Williams"), a white, younger, and less senior employee, was favored over

him for training opportunities, and that when he complained that this treatment was discriminatory his complaints were again ignored.

On September 18, 2001, 3 months before Tratree was to become eligible for an early retirement pension, BP informed Tratree that his position was being "eliminated" because the section of pipeline from Mexia to North Zulch was being decommissioned. Three employees were possibly affected by the decommission: Tratree, Bill White, and Williams. Bill White was a white man more senior and experienced than both Williams and Tratree. Williams was headquartered in Mexia, the station at the end of the then-to-be decommissioned pipeline section, and although classified as a Field Specialist II, his job functions were the same as Tratree's. Tratree alleged that in addition to being senior to Williams, he was also more qualified and skilled than Williams.

After Tratree's job was eliminated, Williams continued to work on the section of pipeline that Tratree had worked previously, doing the same work Tratree had done. Tratree alleged that Gleason, his manager, had decided to eliminate Tratree's position because of the rumor that he would take retirement when he turned 50. As part of this plan, Tratree alleged that Gleason trained Williams to be a Field Specialist II so that he would arguably be more qualified than Tratree when Tratree's job was eliminated. Tratree, however, presented evidence that although he was not classified as such, he was and

had been performing the work of a Field Specialist II for some time.

Under the collective bargaining agreement ("CBA"), employees whose jobs are eliminated are afforded "bumping" rights. Under this process, an employee whose job is eliminated may "bump," or replace, any person with less seniority for whose job he is qualified. Under the "bumping" rules set forth in the CBA, an employee whose job is under an old classification is entitled to "bump" an employee whose job is under a new classification if the employee in the old classification is qualified for that job.[1]

When Tratree received notice that his position had been eliminated, he was given a sheet describing his "bumping" rights. This sheet did not give Tratree the opportunity to "bump" coworkers in new classification designations. Thus, Tratree was not given the opportunity to bump Williams. The notification letter also indicated that Tratree had until September 25, 2001 to exercise his "bumping" rights.[2] Although Tratree understood this deadline, instead of exercising his rights he complained that he was not given the right to "bump" the correct employees, including Williams. On September 24, 2001, BP sent a second

[1] The CBA states, in relevant part, that "[a]ny employee whose assignment is discontinued . . . shall exercise his/her demotional rights for any job he/she is qualified within the new or old classification."

[2] The CBA provides that an employee shall have five-business-days to exercise "bumping" rights.

"bumping" sheet which modified his options but still did not allow Tratree to "bump" Williams. The union chairman advised Tratree to sign the "bumping" form and begin the grievance and arbitration procedure available pursuant to the CBA, but Tratree refused. Ultimately, Tratree did not exercise his "bumping" options. Consistent with the terms of the CBA, Tratree was terminated on September 27, 2001 for failure to exercise his "bumping" rights.

Tratree filed suit for race discrimination and retaliation under Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e, and Section 1981, 42 U.S.C. § 1981, as well as for age discrimination, retaliation, and failure to promote under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621. The district court granted BP's motion for summary judgment as to the Title VII and section 1981 claims, as well as the ADEA failure-to-promote claim, but held that Tratree presented sufficient evidence to raise genuine issues of material fact as to his discrimination and retaliation claims under the ADEA. After Tratree presented his case, however, the district court granted BP's motion for judgment as a matter of law and dismissed Tratree's remaining claims. In this appeal, Tratree challenges both the district court's summary judgment order and its judgment as a matter of law.

II.

We review the district court's grant of judgment as a matter of law and summary judgment *de novo*.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Administaff Cos. v. N.Y. Joint Bd., Shirt & Leisurewear Div.*, 337 F.3d 454, 456 (5th Cir. 2003); *Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1160 (5th Cir. 2006). In this review, we must view all evidence in the light most favorable to the nonmovant, drawing all reasonable inferences in his favor, and disregarding all evidence adverse to him that a jury would not be required to believe. *Reeves*, 530 U.S. at 150-51; *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 349 (5th Cir. 2005). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary judgment may be affirmed on any ground raised below and supported by the record. *Administaff Cos.*, 337 F.3d at 456. Judgment as a matter of law is appropriate if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury does not have a legally sufficient evidentiary basis to find for that party on that issue. FED R. CIV. P. 50(a); *see also Reeves*, 530 U.S. at 150.

III.

A. Race Discrimination

Under Title VII, it is an "unlawful employment practice for an employer . . . to discriminate against

any individual . . . because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Section 1981 grants equal rights to "make and enforce contracts," including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(a)-(b). The district court granted summary judgment to BP on Tratree's claims of race discrimination under Title VII and Section 1981.

This Court recognizes a modified *McDonnell Douglas* burden shifting framework to analyze indirect claims of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc.*, 482 F.3d 408, 411 (5th Cir. 2007); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). Under this approach, the plaintiff must first establish a prima facie case of discrimination by showing that (1) he is a member of a protected class, (2) he is qualified for the position at issue, (3) he suffered an adverse employment action, and (4) he was replaced by someone outside the protected class or was treated less favorably than others similarly situated. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512-13 (5th Cir. 2001); *Rachid*, 376 F.3d at 312; *Rubinstein v. Adm'rs of Tulane Educ. Fund*, 218 F.3d 392, 399 (5th Cir. 2000) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997)). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to proffer a legitimate,

nondiscriminatory reason for its action. *Rachid,* 376 F.3d at 312. If the defendant satisfies its burden of production, the burden then shifts back to the plaintiff to offer sufficient evidence to create a genuine issue of material fact that either (1) the defendant's reason is false and is a pretext for discrimination, or (2) that although the defendant's reason is true the plaintiff's protected characteristic was a "motivating factor" in its decision. *Id.*

Tratree, an African American well qualified for his position, suffered an adverse employment action when his position, rather than Williams's position, was eliminated. He therefore established a prima face case of race discrimination. Tratree also produced evidence that his coworkers used racial epithets in his presence, told racist jokes, and threatened him. Additionally, he asserted that he was treated differently from Williams and other white coworkers and that his district manager granted more training opportunities to whites, never hired African-Americans, and consistently fired African-Americans more often than whites.

BP proffered, as a nondiscriminatory explanation for its action that Williams's position was not eliminated because he was designated as a Field Specialist II whereas Tratree had elected not to participate in the new classification, retaining his old classification as Measurement Specialist I. BP asserted that Williams's additional training enabled him to perform more job functions. This explanation is problematic for two reasons. First, the CBA does not indicate that

new classification employees will be favored over old classification employees when BP considers which positions to eliminate. Thus, BP's argument that it has a policy of favoring new over old classifications is not grounded in written company policy and is belied by the terms of the CBA. Under the CBA, senior employees in old classifications retain the ability to "bump" employees in new classifications so long as the senior employee is qualified for the position held by the less-senior employee. Although this is most relevant to the issue of whether BP provided the correct "bumping" options to Tratree, it also supports an inference that when BP eliminated Tratree's position and refused to allow Tratree to "bump" Williams, it acted contrary to the terms and spirit of the CBA that BP shall not favor employees in new classifications over those with old classifications. Second, Tratree presented evidence that he was just as qualified as Williams, if not more so, was performing the work of a Field Specialist II even though he had not formally achieved that designation, and had performed all functions of his job as required on the relevant section of the pipeline for years. Tratree presented additional evidence that he had done this job without any complaint about his work performance, and there was thus no question that he was able to do the job. Tratree has therefore presented genuine issues of material fact as to whether BP's proffered explanation is the actual reason it eliminated his position rather than Williams's. We thus conclude the district court erred in granting summary judgment on this claim.

B. Age Discrimination and Retaliation

The ADEA makes it unlawful to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The district court granted summary judgment to BP on Tratree's failure-to-promote claim and granted judgment as a matter of law to BP on Tratree's discrimination and retaliation claims under the ADEA.

To establish a prima facie case of failure to promote, a plaintiff must show: (1) he was over forty, (2) was qualified for the position sought, (3) was not promoted, and (4) the position was filled by someone younger or the failure to promote was due to his age. *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1060 (5th Cir. 1998). This Court uses the same standards of proof for indirect discrimination claims under the ADEA as it does for Title VII and Section 1981. *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004). As such, the same burden shifting framework applies to Tratree's ADEA discrimination claims. *Id.* To establish a prima facie case of retaliation, a plaintiff must show (1) that he engaged in activity protected by the ADEA, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action. *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003). Complaining about unfair treatment without specifying why the treatment is unfair, however, is not a protected

activity. *See Harris-Childs v. Medco Health Solutions*, 169 Fed. Appx. 913 (5th Cir. 2006).

We turn, first, to Tratree's failure-to-promote claim. Upon our review of the record, we are satisfied that the district court did not err in determining that Tratree did not produce evidence sufficient to establish a prima facie case of failure to promote. Tratree alleged that BP violated the ADEA because it failed to promote him to Field Specialist II, but by his own admissions he had not completed the on-the-job training necessary to become eligible for the "final check-off" that would have designated him as a Field Specialist II. As such, Tratree failed to allege one element of the prima facie case: that he was qualified for the position sought. The district court therefore correctly determined that Tratree failed to state a claim for failure to promote under the ADEA, and the district court's grant of summary judgment on this claim was proper.

We turn, next, to Tratree's age discrimination claims. Tratree's district manager testified that Lee Edwards, then president of BP, remarked at a company meeting that "BP does, in fact, discriminate against age." Tratree alleged, in addition to this, that the "multi-skilling" program started by Amoco and continued by BP had an internal goal of discriminating against retirement eligible workers. Additionally, Tratree points out that a BP personnel representative indicated that Tratree's position was eliminated because of rumors that he was about to retire. Finally, Tratree stated that although he was

at least as qualified as Williams, a younger worker, Tratree's job was chosen for elimination and Williams was retained and continued to do the work that Tratree had previously done. Tratree also asserted that he had more seniority than Williams and was fully qualified to do the job, which he had been performing without complaint for many years. Tratree thus presented a prima facie case of age discrimination. As discussed above, Tratree presented additional evidence of age discrimination through the statement by the president of BP that the company discriminates based on age[3] and the statement by the personnel representative that Tratree's job was eliminated because BP thought Tratree would soon retire.

BP proffered the same nondiscriminatory explanation, here, as it did for the race discrimination claims. As discussed above, Tratree has presented a question of material fact as to whether BP's proffered explanation is the actual reason it eliminated Tratree's position. BP's explanation is therefore not sufficient to rebut Tratree's prima facie case under *McDonnell Douglas*. For these reasons, the district court erred in granting judgment as a matter of law to BP on Tratree's ADEA discrimination claims.

We turn, last, to Tratree's retaliation claims under the ADEA. BP argued, and the district court

[3] We need not address whether this statement is a "stray remark" because we deem BP's proffered nondiscriminatory explanation for its actions unpersuasive.

agreed, that Tratree did not engage in protected activity because he did not put BP on notice that he was complaining of age discrimination when he complained that Williams (a younger, less senior employee) was being given preferential treatment regarding training for and eventual elevation to the position of Field Specialist II. We agree. Tratree complained of unfair treatment directly in comparison to Williams, but he never referred to the discriminatory treatment as age-based. In addition, although Tratree presented evidence that BP thought that he was going to retire, Tratree did not establish when he made his complaints, so that proof is lacking on the essential element of causation between his complaints and the adverse employment action he suffered. For these reasons, we are persuaded that the district court did not err in granting judgment as a matter of law on the age retaliation claims.

IV.

The district court properly granted summary judgment dismissing Tratree's failure-to-promote claim under the ADEA and in rendering judgment as a matter of law dismissing Tratree's retaliation claims under the ADEA. The court erred, however, in granting summary judgment dismissing Tratree's race discrimination claims under Title VII and Section 1981 and rendering judgment as a matter of law dismissing his age discrimination under the ADEA. For the reasons stated above, we therefore affirm the dismissal of the failure-to-promote claim and the age

retaliation claim, but vacate the dismissal of the race discrimination and age discrimination claims and remand this case to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-21003

D.C. Docket No. 4:03-CV-954

BILLY RAY TRATREE

Plaintiff-Appellant

v.

BP NORTH AMERICA PIPELINES, INC;
KELLY GLEASON

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before DAVIS and SOUTHWICK, Circuit Judges, and DRELL,* District Judge.

JUDGMENT

(Filed May 2, 2008)

This cause was considered on the record on appeal and was argued by counsel.

* District Judge of the Western District of Louisiana, sitting by designation.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Billy Ray Tratree, Plaintiff,	§	
v.	§	CIVIL ACTION H-03-954
BP North America, et al, Defendants.	§	

ORDER

As the jury has entered its verdict in favor of Defendant BP North America Pipelines, Inc and against Plaintiff Billy Ray Tratree, the Court hereby

ORDERS that final judgment be entered in favor of the Defendant. Plaintiff shall take nothing from Defendant. This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 24 day of June, 2009.

/s/ David Hittner
DAVID HITTNER
United States District Judge

Title VII of the Civil Rights Act of 1964

* * *

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed

to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 *et seq.*].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly

announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 *et seq.*] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws –

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had –

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to –

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

Age Discrimination in Employment Act

* * *

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any

notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit

the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the –

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits –

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan –

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement

of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension

benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age

[1] So in original.

described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection –

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(10) Special rules relating to age

(A) Comparison to similarly situated younger individual

(i) In general

A plan shall not be treated as failing to meet the requirements of paragraph (1) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) Similarly situated

For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including period of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) Disregard of subsidized early retirement benefits

In determining the accrued benefit as of any date for purposes of this clause, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) Accrued benefit

For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

(B) Applicable defined benefit plans

(i) Interest credits

(I) In general

An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of return that is

equal to the greater of a fixed or variable rate of return.

(II) Preservation of capital

An interest credit (or an equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) Market rate of return

The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of subclause (I). In the case of a governmental plan (as defined in the first sentence of section 414(d) of Title 26, a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that this sentence shall only apply to a rate of return or method of crediting interest if

such rate or method does not violate any other requirement of this chapter.

(ii) Special rule for plan conversions

If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) Rate of benefit accrual

Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of –

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) Special rules for early retirement subsidies

For purposes of clause (iii)(I), the plan shall credit the accumulation account or similar amount with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

(v) Applicable plan amendment

For purposes of this subparagraph –

(I) In general

The term "applicable plan amendment" means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) Special rule for coordinated benefits

If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) Multiple amendments

The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph through the use of 2 or more plan amendments rather than a single amendment.

(IV) Applicable defined benefit plan

For purposes of this subparagraph, the term "applicable defined benefit plan" has the meaning given such term by section 1053(f)(3) of this title.

(vi) Termination requirements

An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan –

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose

as of the termination date, except that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) Certain offsets permitted

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides offsets against benefits under the plan to the extent such offsets are allowable in applying the requirements of section 401(a) of Title 26.

(D) Permitted disparities in plan contributions or benefits

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(l) of Title 26 are met.

(E) Indexing permitted

(i) In general

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) Protection against loss

Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the

accrued benefit determined without regard to such indexing.

(iii) Indexing

For purposes of this subparagraph, the term "indexing" means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by means of the application of a recognized investment index or methodology.

(F) Early retirement benefit or retirement-type subsidy

For purposes of this paragraph, the terms "early retirement benefit" and "retirement-type subsidy" have the meaning given such terms in section 1053(g)(2)(A) of this title.

(G) Benefit accrued to date

For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken –

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained –

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of –

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section –

(1)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(i) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(ii) a defined benefit plan (as defined in section 1002(35) of this title) provides for –

(I) payments that constitute the subsidized portion of an early retirement benefit; or

(II) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 *et seq.*), and that do not exceed such old-age insurance benefits.

(B) A voluntary early retirement incentive plan that –

(i) is maintained by –

(I) a local educational agency (as defined in section 7801 of Title 20, or

(II) an education association which principally represents employees of 1 or more agencies described in sub-clause (I) and which is described in section 501(c)(5) or (6) of Title 26 and exempt from taxation under section 501(a) of Title 26, and

(ii) makes payments or supplements described in subclauses (I) and (II) of subparagraph (A)(ii) in coordination with a defined benefit plan (as so defined) maintained by an eligible employer described in section 457(e)(1)(A) of Title 26 or by an education association described in clause (i)(II),

shall be treated solely for purposes of subparagraph (A)(ii) as if it were a part of the defined benefit plan with respect to such payments or supplements. Payments or supplements under such a voluntary early retirement incentive plan shall not constitute severance pay for purposes of paragraph (2).

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age –

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that –

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age) –

> **(i)** the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 *et seq.*);
>
> **(ii)** the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or
>
> **(iii)** the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions) –

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if –

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that

could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

24 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

PX 54

An estimated 30-40 people will accept the severance package (excl. those who don't want to relocate to an attrition pool)

	Hourly	Supervisory	Totals
Total reduction target			100
Hiring freeze attrition			28
Voluntary Severance			
Retirement eligible population			
55+ years of age	28	11	39
50-54 years of age	20	5	25
Total	48	16	64
Estimate of acceptances			
Retirement eligible age	25-30	5-10	30-40
Other (relocation/ attrition pool)	5-8	0-3	5-11
Total			35-51
Additional reductions required post voluntary severance			21-37

Key issues requiring discussion/resolution

Employee severance

- ✓ What flexibility do we have in labor negotiations regarding the components and timing of the "vision"?
  - e.g. how key is multi-skilling to the achievement of severance targets?
- ✓ Approach with people who accept voluntary severance
  - how will we determine appropriate departure date?
- ✓ Voluntary severance is not likely to reach our reduction target
  - how do we get the rest? and when?

Systems

- ✓ Will the Steering Committee support an immediate evaluation of an APL-driven solution and commit the necessary resources?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILLY RAY TRATREE	:	H-03-CV-954
	:	HOUSTON, TEXAS
vs.	:	JUNE 12, 2009
	:	10:05 A.M.
BP (NORTH AMERICA) PIPELINES, INC.	:	
.....	:	

TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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Emily Frost
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FOR THE DEFENDANT:

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Steven R. Rech
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OFFICIAL COURT REPORTER:

Cheryll K. Barron, CSR, CM, FCRR
U.S. District Court
515 Rusk Street
Houston, Texas 77002

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[70] it's the person behind him directing and everything."

THE COURT: What about that?

MR. SOLTERO: Your Honor, that particular excerpt, maybe that ought to be taken out.

THE COURT: Not "ought" to be taken – did you offer that?

MR. RECH: No, he did not offer that, your Honor. I don't want the Court to think that he did.

MR. SOLTERO: And, your Honor, the other thing is this. The Darrel Jackson testimony doesn't just go to this arbitration issue that they're trying to pigeonhole it into. What he is saying is, "I worked under Kelly Gleason's district, the same district as Mr. Tratree. Black people were subjected to mistreatment discriminatory treatment, in my opinion, as a worker in this area."

MS. OATHOUT: He never –

THE COURT: Yeah, but what did you do? Did you take him on cross?

MS. OATHOUT: He never complained about a single instance of discrimination, your Honor

MR. SOLTERO: A witness doesn't have to.

THE COURT: Hold it. Did you –

MS. OATHOUT: Sorry.

THE COURT: Did you state that in your cross-examination?

[71] MS. OATHOUT: At the time, your Honor, he was on disability from BP. Our ability to cross-examine an employee on disability is severely limited because they claim, "You are harassing me." So, now they're offering –

THE COURT: Did you do any cross-examination?

MS. OATHOUT: It is very limited, your Honor. But this man, I can't stress enough, only in retrospect is saying, "I think" – and there's a ton of hearsay in this – "I think this" –

THE COURT: All right. Grant – it's granted now. It's on hold. If it's short, I'll probably read that whole deposition. That's it.

MS. OATHOUT: Actually – (Indicating).

THE COURT: What's that? What are you handing up?

MS. OATHOUT: We have a trial brief that we've submitted on this, showing all of the instances how he's not similarly situated. He was not supervised by the same person in the same area, etcetera. That's another basis. So, that's – that is before the Court, as well.

THE COURT: All right. We'll rule on it. Probably won't be this afternoon. You'll probably have it on Monday.

MR. SOLTERO: And, your Honor, we have a trial brief on the culture of discrimination issue, because the only way to prove discrimination cases is not just by similarly situated. If there is a pervasive attitude, as the Fifth Circuit found in

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILLY RAY TRATREE	:	H-03-CV-954
vs.	:	HOUSTON, TEXAS
	:	JUNE 15, 2009
BP (NORTH AMERICA) PIPELINES, INC.	:	10:22 A.M.
. . . . .	:	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE
DAY 1 OF 7

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[73] THE COURT: I see you're ready to run, but you don't have to be back at this end. If the plaintiff wants to sit there, you're welcome to. You don't need to be back at that end.

All right. These are the defendant's motions in limine. So, if they are granted, it doesn't get in. If it's overruled, it does get in. All right? So, they wanted to stop the plaintiff from these various items. Some I'm going to say "granted," some "overruled." Again, if it's overruled, they can come in; if it's granted, you keep it out.

As to Number 15, as to Lee Edwards' comments, overruled. It may come in.

Number 16, Lord Brown, granted. It's out.

Twenty, any reference to claims brought by other persons other than the plaintiff, granted. It's out.

Twenty-one, keep out any reference to other "me too" anecdotal evidence, out. It's granted, in effect.

Number 22, to keep out a reference to or by Darrel Jackson, in effect, another similar employee. There's a question of whether or not he was in similar circumstances when he filed his complaints, so forth.

I looked at all of that. Number 22, your tender to get that in, is denied. It is granted. It's out.

Twenty-three, reference to discriminatory treatment that Tratree may have been subject to prior to

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILLY RAY TRATREE	:	H-03-CV-954
	:	HOUSTON, TEXAS
vs.	:	JUNE 16, 2009
	:	10:06 A.M.
BP (NORTH AMERICA) PIPELINES, INC.	:	
. . . . .	:	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE
DAY 2 OF 7

APPEARANCES:

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* * *

[291] they're going before I allow it in. So, we'll see you back in 15 minutes.

(Jury not present)

THE COURT: All right. Everybody have a seat.

All right. Let the record reflect the jury is out of the room.

Make it short and to the point, because this is like an offer of proof. And then I may let it in. Okay? So, get right to the point.

And, sir, if you remember, great. If you don't, we need to know that so we'll move on.

Go on.

BY MS. FROST:

Q. Mr. Johns, what African-Americans do you know of who were let go under Kelly Gleason?

A. My recollection –

THE COURT: Pull that in, please. Pull the mic in, sir.

THE WITNESS: Sorry.

A. My recollection is it was a man by the name of Darrel Jackson, I believe, in this period – in this time. Seemed like Chip Hardy was one during that period of time. I'm not sure whether Richard Williams was one, but in that same area, same period of time,

THE COURT: All right. Only because this is a

* * *

[295] these folks were let go?

THE WITNESS: Some of them, perhaps; but that's a long discussion, you know. But some of them, yes. What – what was purported to be the reason, yeah.

THE COURT: Were you subpoenaed to be here today?

THE WITNESS: Yes, I was.

THE COURT: All right. We appreciate it. It's tough sometimes. I understand.

THE WITNESS: Yeah. I mean, yes, sir.

THE COURT: But it's the nature of the judicial system.

THE WITNESS: Yes, sir.

THE COURT: Okay. Because everybody deserves a shot –

THE WITNESS: Sure.

THE COURT: – and that's what we're all here for. All right. Go on, counsel.

BY MS. FROST:

Q. Mr. Johns, did Kelly Gleason disproportionately fire Blacks as opposed to Whites?

MR. RECH: Objection, your Honor.

THE COURT: Overruled. Overruled for purposes of this hearing. Okay?

What?

All right. Go ahead.

[296] MR. RECH: No. No. I was just going to say thank you, and then I decided not to because that would be –

THE COURT: You're not supposed to thank the Court for a ruling.

Go on.

THE WITNESS: So, I can go ahead and answer?

THE COURT: Yes, sir.

A. When you're talking about disproportion within the last 20 years, I would have to say that's been the case, period.

BY MS. FROST:

Q. And that's true under Kelly Gleason, as well?

A. I would say that's true under Kelly Gleason, as well.

THE COURT: All right. Let me stop you right here.

Defense, does it have to be under Mr. Gleason himself?

MR. RECH: Yes, sir.

THE COURT: Okay. That's what I thought.

Go on.

MS. FROST: Your Honor, that's all I have on this subject.

THE COURT: All right. You going to take him on a few voir dire questions?

MS. FROST: Your Honor –

THE COURT: Yes, ma'am?

MS. FROST: When they're done, I have another topic

* * *

[303] MS. FROST: He's retired, I believe, your Honor.

THE COURT: Mr. Johns, you want to come up?

Off the record.

(Discussion off the record)

THE COURT: I need to make a ruling. I considered the parameters and the background of this gentleman together with his exposure, his testimony, and the proximity to the alleged individual or individuals who are being accused directly in this case as agents of the defendant.

You – the defendants object to this line of questioning on both the counts of age discrimination and race discrimination. Is that correct?

MR. RECH: Yes, sir.

THE COURT: All right. Those objections are granted. His testimony will now serve also as an offer of proof. So, you have it in the record. Tender is denied. Let's call the jury in, please.

THE CASE MANAGER: All rise for the jury.

(Jury present)

THE COURT: Thank you. Be seated.

All right. Ready to proceed, counsel. Go right ahead.

DIRECT EXAMINATION

BY MS. FROST:

Q. Mr. Johns, in 2004 and 2005, did you work with Grayson

* * *

[375] A. Yes.

Q. Was it also negotiated with the union, Mr. Tratree – I'm sorry. I am so sorry. I've heard the word – Mr. Tratree's name so often.

Mr. Toomer, was it also negotiated with the union that old classifications could not bump someone in a new classification?

A. Correct.

Q. Did the union agree to that term, as well?

MR. SOLTERO: Your Honor, I'm going to object to that. That calls – well, first of all, there's absolutely no written modification to the agreement; and it calls for parole evidence.

THE COURT: Rephrase it. See if you can get around it.

MR. SOLTERO: Your Honor, can I take him on voir dire?

THE COURT: No, not yet.

MR. SOLTERO: Okay.

BY MS. OATHOUT:

Q. Did the union ever object to the bumping being handled in such a way that old classifications could not bump new classifications?

A. No.

Q. Looking at this same letter, Mr. Toomer, did you inform Mr. Tratree that if he had any questions he could contact you?

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILLY RAY TRATREE	:	H-03-CV-954
vs.	:	HOUSTON, TEXAS
	:	JUNE 17, 2009
BP (NORTH AMERICA) PIPELINES, INC.	:	10:05 A.M.
. . . . .	:	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE
DAY 3 OF 7

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[452] PROCEEDINGS

(Jury not present?)

THE COURT: All right. Be seated.

I'm ready to rule on these matters. I'm going to tell the jury that we'll be with them in less than five minutes.

(Discussion off the record)

THE COURT: All right. I'm ready to rule on the matters – well, let me first turn my phone off. That's why I keep this here and it goes under the calendar for the next day, so I remember to do that. It's bad enough when a lawyer's phone goes off. See the judge ripping into some lawyer and than his or hers goes off.

All right. I'm going to give you just a little bit of an overview, and that's what we were doing in the afternoon and yesterday evening. Basically we're dealing with the parameters that the plaintiff can discuss as to prior occurrences relative to the discrimination. We've read a bunch of cases, some that, you know, you submitted and we did a lot of independent

research. Even though this comes up from time to time, this is the first time in awhile it's been squarely in; and I think you're entitled to have it in the record. And then we can move on.

The best I could find, Courts have found racial comments to be admissible as direct evidence when the comments [453] are related to the protected class of persons of which the plaintiff is a member, was proximate in time to the termination, made by an individual with authority over the employment decision, and related to the employment decision at issue.

Workplace comments may be offered as circumstantial evidence if the remarks demonstrate discriminatory animus on the part of a person who is either primarily responsible for the challenged employment action, by a person of influence or leverage under the relevant decision maker. And, so, we're – and we're – and coworkers are not generally in that circumstance. So, this is the order.

I will allow counsel to question Tratree about racially charged or age related comments made by BP supervisors or BP managers who made the termination decision or could have had influence in making the decision to terminate him. The testimony needs to be sufficiently proximate in time to the termination.

Some district courts have found that comments made more than eight months prior to the termination are not sufficiently proximate in time; so, you need to consider that. However, the bottom line is the

discussion in this area will be limited to the 300 days prior to the filing of the EEOC charge.

Therefore, the plaintiff will be allowed only to testify to comments that were made by BP supervisors or others [454] who were involved in the decision to terminate him and were made between May 28, 2001, and the time he was terminated, September, 2001.

Let's call the jury in, please.

MS. FROST: Your Honor, may I ask a question about your ruling?

THE COURT: You may.

MS. FROST: The testimony in this case will show that Mr. Tratree complained to his supervisors about racial slurs that he was subjected to while at BP. May that testimony come in?

THE COURT: If it's within that time frame. If it was in that time frame. I'm allowing it in that time frame. The answer is, yes, based upon the parameters set out.

Let's call the jury in, please.

THE CASE MANAGER: All rise for the jury.

(Jury present)

THE COURT: Thank you. Be seated.

The matters that were discussed this morning, I'm going to tack on or put a paper clip on and bring it back in with me later, after you've reached a verdict, and I'll discuss it with you, as to what the academics were that we were in the middle of doing the last few minutes.

All right. The plaintiff was up, correct?

MS. FROST: Yes, your Honor.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILLY RAY TRATREE	:	H-03-CV-954
	:	HOUSTON, TEXAS
vs.	:	JUNE 18, 2009
BP (NORTH AMERICA)	:	10:05 A.M.
PIPELINES, INC.	:	
. . . . .	:	

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* * *

[716] THE COURT: Then what? Gleason, is that the last witness?

MR. SOLTERO: Well, this is the order, your Honor. After Frammolino comes a five-minute video from Mr. Ortega.

THE COURT: All right.

MR. SOLTERO: We also have an offer of proof on Mr. Ortega which is – we would ask your Honor to reconsider the multiskilling ruling and allow us to get into the documents that show that the company was targeting for involuntary severance retirement-eligible workers age 50 to 54. And those are Plaintiff's Exhibits, I believe, 53 through 57.

After Mr. Ortega, a very short video, it will be Ms. Tratree, the wife of Mr. Tratree.

THE COURT: Where is she?

MR. SOLTERO: She's right outside the courtroom.

THE COURT: Oh, so, you're going to put her on?

MR. SOLTERO: Yes, your Honor.

And, then, finally Ms. Boyd, the daughter of Mr. Tratree.

And then we wanted to read these excerpts from Mr. Gleason, which is what I was asking your Honor to take up first. We can do it in whatever order.

Oh, and I want to read the interrogatory answers that BP gave and the stipulation on net worth.

THE COURT: We'll do – everything that's contested,

* * *

[786] THE COURT: 03954, correct? Is that it?

MR. SOLTERO: Your Honor, Plaintiff's Exhibit 54, yes.

THE COURT: Exhibit 54 –

MR. SOLTERO: Yes.

THE COURT: – 57 – these are plaintiff's exhibits, correct?

MR. SOLTERO: Yes, your Honor. And –

THE COURT: Hang on a second.

MS. OATHOUT: Your Honor –

THE COURT: Don't worry about it. You don't know where I am going. All right?

Tender has been made for Exhibit 54, Plaintiff's Exhibit 54, 57, 56, 58 –

MR. SOLTERO: I think that's the second page of 58, your Honor.

THE COURT: The second page of 58.

MR. SOLTERO: And the third page of 58.

THE COURT: The third page of 58.

MR. SOLTERO: I believe that's the fourth page, but I wouldn't swear to that.

THE COURT: Fourth page of 58, and 53.

Now, a lot of these are charts and part of the – what do you call it –

MR. RECH: Power Point.

THE COURT: – Power Point. Is that correct?

[787] MR. RECH: Yes, your Honor.

THE COURT: Okay. Tender is refused. It's denied. Admission is denied.

Let's go back, and we're going to wrap it up right now.

MR. SOLTERO: Okay. Your Honor –

THE COURT: Yes.

MR. SOLTERO: – we have a series of other tenders we want to make before we rest. And I understand your Honor –

THE COURT: Then we'll do it out of the hearing of the jury. Let's go.

MR. SOLTERO: Yes, your Honor.

THE COURT: Let's go. Here, whose is this?

That's yours. Thank you very much.

(*In open court*)

THE COURT: When a case is submitted to the jury, some questions may be asked relative to punitive damages – that's damages strictly in the province of the jury – as punishment. And I'm not commenting one way or another, but we want to get one – if that's applicable, then the value of the defendant, if it's an individual or a corporation, may be entered into evidence.

Keep in mind, the instructions that you'll get will be something like this, with full definitions, that, for you to reach an issue of punitive damages, if the plaintiff is

* * *

[790] procedure to proceed on or any other rulings that I make in 20 minutes. We'll see you at 2:30.

THE CASE MANAGER: All rise.

(*Jury not present*)

THE COURT: All right. Plaintiff, what else do you have? Let's get on with yours first, please.

MR. SOLTERO: Yes, your Honor. First of all, we would offer – and if it's okay with your Honor, I'm going to get next to the court reporter.

MR. RECH: Judge if, we can – and I don't want to be hyper technical, but I do believe the plaintiff has rested.

THE COURT: That's hyper technical.

MR. RECH: Okay.

THE COURT: Because when we were up here, if you remember, I said: All right. Let's do it after the jury goes out.

MR. RECH: If that's what the Court said, then ignore what I said.

THE COURT: But your request for precluding him from saying anything else, that's denied.

All right, counsel.

MR. SOLTERO: Yes, your Honor.

First of all, Mr. Tratree, if allowed to testify as to the matters that were excluded, would have testified that coworkers used racial epithets in his presence; they told [791] racist jokes; that he was subjected to the "N" word; that through 23 years of employment he was harassed and discriminated; that in 1983 and

1984 there was threats of physical force against him, including saying, "I'll whip your Black ass," by White coworkers.

The company found, in fact, that there had been a hostile and improper work environment for Mr. Tratree. That would all be background relevant to, first of all, his history in the discrimination and, secondly, his response to the bump sheet when it was issued.

In addition, he was treated differently from Mr. Williams and other White coworkers and that his district manager granted more training opportunities and never hired African-Americans and consistently fired African-Americans.

On that point, we would tender the interrogatory as well as the testimony from Mr. Gleason that was excluded.

THE COURT: Some of that has already been in. That's global. You need to hit it on the nose.

MR. SOLTERO: Yes, your Honor.

THE COURT: I'm not going to take global objections because that's – that's putting me on the hot seat. I don't mind sitting here, but not as to what I let in already.

MR. SOLTERO: Your Honor, specifically as to the witness Darrel Jackson, if allowed, Darrel Jackson would testify that there was a culture

of discrimination at BP [792] towards African-Americans, including the –

THE COURT: Hold it. What?

MR. RECH: I think with respect to Darrel Jackson, what you said – I think what was done previously was the deposition was given and I think you said that's the offer. So, I think we've crossed the Darrel Jackson bridge.

THE COURT: I think we have.

MR. SOLTERO: Okay, Judge. I'll move on.

MR. RECH: We have.

MR. SOLTERO: I'll move on.

THE COURT: If you've already done this, let's move on.

MR. SOLTERO: I will, Judge. With regards – go ahead.

MS. FROST: Your Honor, I would just like to add something on the Tratree offer of proof. And that is that Tratree complained to his supervisor, Mr. Bowden, about the racial jokes and the "N" word in the 2000-2001 time frame –

THE COURT: Hold it. Did we hear that or not?

MS. OATHOUT: I think there's testimony in there, and you permitted 2000 – May, 2001, forward.

THE COURT: That's right. Don't tell me. You rested. You can say whatever you want. Now, if I overrule that without my jumping in, you do just what you're doing now, you get up and say it was in. All right?

[793] MS. OATHOUT: I'm waiting for them to finish.

THE COURT: All right.

MS. OATHOUT: So, when she tells me that's her statement, we will stand up and make our objections.

THE COURT: All right. Fair enough. Mark it down. Unless I hear something that I completely disagree with – like, I heard one thing already.

Go on.

MS. FROST: And that after he complained to his supervisor, Mr. Bowden, not just once, but several times, that the atmosphere never changed and that the "N" jokes and the racial slurs continued. Also, in the 1980's, I believe Mr. Tratree –

THE COURT: How can you get it back in 1980's, counsel? Your firm does this work all the time. Isn't that remote in time, back in '83 and we hear that he was let go in 2001 or something? I mean –

MS. FROST: It is remote in time, and I don't know what the Fifth Circuit will do with it. The reason I think they might be willing to consider this evidence is because in their opinion they say that

BP's coworkers threatened him and that was the evidence from 1984. And because they put that in their opinion and they considered it –

THE COURT: Who was on the panel?

MS. OATHOUT: A visiting judge from the Western [794] District of Louisiana wrote the opinion, your Honor. And I don't recall his name.

MR. SOLTERO: It's actually per curiam; and it was Judge Davis, Judge Southwick, and Judge Drell.

MR. RECH: I think, as I recall in the summary judgment affidavit that was submitted, there wasn't dates.

THE COURT: There wasn't what?

MR. RECH: In the race discrimination claim, there was a summary judgment affidavit and it didn't contain dates. And so –

MS. OATHOUT: Again, this was not trial testimony, your Honor.

MR. RECH: Hold on.

MS. OATHOUT: I'm sorry. This was –

THE COURT: All right. Off the record. Come on up here for a second. Okay? Come on up here.

Off the record.

(*Discussion off the record at the bench with all counsel*)

THE COURT: Okay. Go right ahead.

On the record.

MR. SOLTERO: And, your Honor, to summarize, we would also offer testimony from Mr. Ortega on the multiskilling issue that was excluded, including the numerous exhibits, Plaintiff's 52 and those, regarding the company's –

THE COURT: Didn't we do that already?

[795] MR. RECH: Yes, your Honor. Those have been offered and denied.

THE COURT: That's been offered already. Let's keep moving.

MR. SOLTERO: And then – is there anything you –

THE COURT: I mean, don't forget, everything you want from the deposition that I excluded, that's part of something you can complain about again to the Circuit if you need to.

MR. SOLTERO: Okay. Well, your Honor, in light of that, we'll move on to just the exhibits; and then we'll be done.

THE COURT: Okay.

MS. FROST: Your Honor, would you like me to just read the numbers or go through and explain to you each one?

MR. SOLTERO: No, no. Just read the numbers.

MS. FROST: Just read the numbers? Okay.

MR. RECH: Judge, I think that they – never mind. Sorry.

THE COURT: Did you offer them before?

Because I think anything that has not been offered –

MS. OATHOUT: Exactly.

THE COURT: – unless it's done by agreement, is not admitted, In federal court you do this as a broad brush. So, I'll do it right now.

[796] Everything that's not in by agreement and everything that hasn't been previously ruled upon that is in evidence – and a number of things were reserved for trial – if they were – if they were offered or if they – during the trial, then that's the ruling. If they have not been offered at all, it's a little late to do that. Because you got to do it, you got to offer it during the trial.

And that's what I said. I said anything I don't admit at the beginning we'll do it like in state court. You got the document, you try to get it in; and we've done that with a number of things.

So, you know, what else you got?

MR. SOLTERO: Nothing more at this time, your Honor.

THE COURT: Okay. All right. Overruled. Okay?

All the testimony and all other matters offered by the defense that are not already in evidence or previously ruled upon are denied. All right?

Now –

MR. SOLTERO: Your Honor, for clarification, I think you just said the defense. Did you mean the plaintiff?

THE COURT: I mean, I'm sorry. For the plaintiff. Sorry. Thank you.

All right. Now, what does the defense have?

MR. RECH: Your Honor, the defense has a motion for judgment as a matter of law. I'm handing the clerk and the

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[817] pay.

Q. But is it a demotion, Mr. Torres, if you're given bumping options and you take the same classification – classified job?

A. No, ma'am, it's not a demotion.

Q. So, for example, if a Measurement Specialist I bumps another Measurement Specialist I, is that a demotion?

A. No, ma'am.

Q. Do they receive the same pay?

A. Yes, ma'am.

Q. Do they receive the same benefits?

A. Yes, ma'am.

Q. Do they receive the same seniority rights?

A. Yes, ma'am.

Q. Do they retain the same classification?

A. Yes, ma'am.

Q. Do they have the same work hours?

A. Yes, ma'am.

Q. Do they lose any progress of moving up in the continuum?

A. No, ma'am.

Q. Under Article 10.1, Mr. Torres, could an employee in an old classification bump someone in a new classification?

A. No, ma'am.

Q. Why not?

A. Because of the difference –

MR. SOLTERO: Your Honor, I object. All this [818] testimony is contrary to the contract and violates the parole evidence rule. There's nowhere in that contract that says that.

THE COURT: All right. Lay some additional predicate how you get to that point.

And, of course, if you see opposing counsel stand up – okay – don't answer the question. I need to consider it.

All right. Go on, counsel.

MS. OATHOUT: I will.

BY MS. OATHOUT:

Q. Mr. Torres, under Article 10.1, could an employee in an old classification bump an employee in a new classification?

A. No, ma'am.

MR. SOLTERO: Your Honor, I object to –

THE COURT: Wait a second.

You saw him come up, sir. You need to not answer.

THE WITNESS: I'm sorry.

THE COURT: All right.

MR. SOLTERO: He's not allowed to interpret the plain language of the contract or try to bring in some other interpretation what that is. It speaks for itself.

THE COURT: Yeah. How do you get around that?

MS. OATHOUT: We're going to talk about the contract.

[819] BY MS. OATHOUT:

Q. Tell me what language you're referring to, Mr. Torres. Is that appropriate –

THE COURT: All right. Ladies and gentlemen, if it's a legal question, I'll have to make a ruling on it. Let's see where it goes. Okay?

So, the plaintiff has objected. I'm going to withhold ruling on the plaintiff's objection because defense counsel says she's going to lead into it, find into it somewhere; and we'll take a look at it.

Go on.

BY MS. OATHOUT:

Q. Mr. Torres, please refer to Article 10.1 and tell us what language you're referring to when you say someone in an old classification cannot bump someone in a new classification. And if it's easier to look at it in front of you –

A. I did not bring my glasses. I'm going to be able to read this better.

Excuse me.

THE COURT: You need some reading glasses?

MS. OATHOUT: We have some.

THE COURT: Okay. Because I've got some I keep in my car. I don't need them. I have bifocals. A lot of people, depending upon one's age, of course – I keep an extra pair. I keep a pair in my car.

[820] MS. OATHOUT: So does Mr. Rech. Probably not your style but –

MR. RECH: Your Honor, I'm going to object to the sidebar.

A. When I read this paragraph and I look where it says, "which he or she is qualified within the old or new contract" –

BY MS. OATHOUT:

Q "Classification"?

A. – "classification," correct, that's where the qualifications come in first, before seniority.

MR. SOLTERO: Your Honor, we object to that as parole – under the parole evidence rule. It's nonresponsive. We move to strike, and I would like to take the witness on voir dire if your Honor would let me.

THE COURT: Yeah, you can do that.

Voir dire is – you thought we had it at the beginning of the – what that is, at certain places in – when we have testimony, if there's a challenge to whether or not someone can testify to a certain area, the other

side may come in for a few questions and test the knowledge of that witness. So, that's what we're doing right now.

VOIR DIRE EXAMINATION

BY MR. SOLTERO:

Q. Mr. Torres, let me show you – do you recognize this?

A. Yes.

[821] Q. This is the "Definition" section of the contract, the collective bargaining agreement, is it not?

A. It is.

Q. And can you read "qualifications" for us?

A. Qualifications means "possession of the standards essential to the workmanlike performance of a given job."

Q. It mentions classifications nowhere in there. Is that correct, sir?

A. Didn't mention classifications, no.

Q. Right. And isn't it true, sir, that nowhere in that agreement does it say that you have to be classified a certain way in order to be qualified to do what the work is, nowhere in that document, true?

A. Nowhere in the contract?

Q. That's right.

A. (No response).

Q. Let me --

A. As a composite?

Q. No, sir. What I am asking you simply is this. Can you point to any sentence in that contract that says that classifications is part of the definition of qualifications, in the written contract?

A. There's none.

THE COURT: All right. Now --

MR. SOLTERO: I move to strike his testimony.

[822] THE COURT: Not yet. Let's see if she can – what your response is or – rehabilitate.

DIRECT EXAMINATION

BY MS. OATHOUT:

Q. Mr. Torres, what is the objective way that the union and the company agreed to determine if an employee is qualified?

MR. SOLTERO: Same objection, your Honor.

THE COURT: All right. Now, are you saying that they agreed on doing it a certain way?

Did you say that the company and the union agreed, for want of a – not a legal term, but as a matter of practice, to interpret it a certain way?

MS. OATHOUT: I'm saying "qualified," in order to possess the workmanlike – whatever it says – workmanlike qualifications for the job, you have to assess if someone has those workmanlike skills. And that's by testing them and classifying them a certain way.

THE COURT: Well, of course, the preamble is just the beginning, with some broad definitions. How do you get around that?

MS. OATHOUT: By asking him how were qualifications determined.

THE COURT: And what – by both the union and the company?

MS. OATHOUT: Yes, sir.

[823] THE COURT: All right. For that limited purpose, I'll allow him to testify, keeping in mind what the wording says. And I'm allowing him to proceed as to how both sides had agreed to proceed in such matters. But you heard what counsel said relative to the reading of the contract.

Now, for that limited purpose, I'll allow you to discuss it with this gentlemen.

Overrule the objection to that extent.

Go on.

BY MS. OATHOUT:

Q. Mr. Torres, did the company and the union agree that there would be a process by which to determine employees were qualified?

A. Yes, we did.

Q. What was that process?

A. It was the skills portion of the curriculum that we had agreed to.

Q. And what did that entail?

A. Training, on-the-job training, testing, and evaluation process.

Q. Books, OJT, and check-off?

A. Yes, ma'am.

Q. And did it entail that someone had to be classified so that was objective way to determine if they were qualified?

MR. SOLTERO: I object. This is repeatedly leading [824] this witness as to the parole that she's trying to get him to testify to.

THE COURT: I'm just going to say it's leading. Sustained.

BY MS. OATHOUT:

Q. Was part of the process checking them off?

A. Yes, ma'am.

Q. And determining that they would be qualified to do certain things?

A. Yes, ma'am.

Q. Was it also classified?

A. Yes, ma'am.

Q. Okay. To your recollection, Mr. Torres, was this consistently applied this way by the union and BP in 2001?

A. Yes, ma'am.

Q. Mr. Torres, as union chair in 2001, did you ever inform the company in any -- at any time from May 28th, 2001, forward, that persons in old classifications should bump persons in new classifications?

A. No, ma'am.

MS. OATHOUT: Let's go to Article 10.2.

BY MS. OATHOUT:

Q. Why not?

A. Because it was agreed upon, when this contract was written, that "qualifications" meant this training curriculum, that was [825] agreed upon, as well as testing and the evaluation process to receive qualifications.

MR. SOLTERO: Your Honor, I –

THE COURT: What?

MR. SOLTERO: I object on the grounds of parole –

THE COURT: Sustained as to that – to that answer.

MR. SOLTERO: And move to strike, Judge.

THE COURT: The answer is struck.

You got your point already.

MS. OATHOUT: Yes, sir. I will move on.

THE COURT: Because we know what the writing says; we know what the habit is. But now he went into legal matters, and that's why I sustained the objection.

MS. OATHOUT: I will move on, sir.

THE COURT: Go on.

BY MS. OATHOUT:

Q. Article 10.2 addresses the bumping selection procedure. Do you recall that employees had five days to submit their bumping options?

A. Yes, ma'am, I do.

Q. Why was it five days, Mr. Torres?

A. Because the bump process took an extensive period of time to execute. Once you have displaced

one worker, then that worker displaces another worker, which displaces another worker, until there is a vacancy open.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILLY RAY TRATREE	:	H-03-CV-954
vs.	:	HOUSTON, TEXAS
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DAY 5 OF 7

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[1052] MR. SOLTERO: And, your Honor –

THE COURT: All right. What do you have?

MR. SOLTERO: We basically – we move for a JMOL on the basis that there's no evidence to go to a jury on the issue of mitigation of damages or that he had any duty to bump – to sign the bump sheet.

And in addition, Judge, the terms of the contract are unambiguous; and, so, we think that – that that should also be something we're granted judgment as a matter of law on.

THE COURT: So, what would be submitted to the jury under that scenario?

MR. SOLTERO: Well, there would be no question or instruction on mitigation because we've proved that their – that they failed to meet their burden as a matter of law.

THE COURT: Okay. Is that it?

MR. SOLTERO: Yes, your Honor.

THE COURT: Overruled.

Okay. Now, we need everybody here.

First of all, Ellen.

(Sotto voce discussion at bench with court staff)

THE COURT: All right. I need to be out of here Monday – let's talk about it – at 11:40, just like yesterday. All right? And I'll be back right about 1:30. I'll leave early and get back at 1:30. These are two matters that have been on my schedule for months.

* * *

[1082] adding "and terminating" is twofold. One, "termination" is not part of the joint pretrial order at all, nor was that the case that they tried.

THE COURT: Okay. Is it?

MS. FROST: No, your Honor, it's not part of the joint pretrial order; but it's part of our pleadings.

THE COURT: Sustain the objection. Joint pretrial order supplants the pleadings in federal court. That's a big teaching point if you're not familiar with it. Completely supplants it in the federal system.

All right. What else you got?

What? Every paragraph you got a problem?

MR. COVELER: Well, your Honor, unfortunately, with regard to Number 2, this is BP's contention and we would propose Defendant's Proposed Instruction Number 2.

MR. RECH: I think we can agree on 2 at the end of the day, don't you think?

MR. COVELER: I think that we have –

MR. RECH: We'll take care of 2 ourselves, your Honor.

MS. FROST: Yes, your Honor, I agree.

THE COURT: Okay. We move on.

MR. COVELER: Your Honor, Number 3 is fine; but with regard to 4, 5, and 6, it's the defendant's contention that those misstate –

THE COURT: What do we need to even have this in for?

[1083] MS. OATHOUT: We don't.

THE COURT: I'm looking.

MS. OATHOUT: We don't.

THE COURT: I've done a bunch of these things. Hang on. Let me just read this. Okay?

This is – I can comment on the evidence, but this is strictly a comment on the evidence. It's strictly a comment on the evidence.

Yeah. For instance, I'm interpreting it. "You are further instructed that under the CBA senior employees in old classifications retain the ability" – let them decide that, that you're doing it. I'm not going to give

an instruction on all of this. This is part of your proof. I am not going to bolster it or comment on it.

Therefore, what you – therefore, do you have – do you have a motion as to the age discrimination tender on Pages 10 and 11?

MR. COVELER: Your Honor, we do. Well, there's two different parts. With regards to all of the submissions, we would argue that they are an improper comment on the weight of the evidence.

THE COURT: No, sir. I can comment on the weight of the evidence.

MR. COVELER: Absolutely.

THE COURT: No, sir. So, this is federal court. A [1084] federal judge can comment on the weight of the evidence. I just told you what I choose not to do, and I've not seen this in any kind of a case that I've been in on.

Do you want to withdraw it or not?

MS. FROST: No, your Honor. We would like a ruling on Paragraphs 8 –

MR. SOLTERO: Your Honor, because –

MS. FROST: – and 9.

MR. SOLTERO: May we be heard?

THE COURT: Go on.

MS. FROST: Yes, your Honor. This is the language from the Fifth Circuit in Paragraph 8, where they held that the CBA did not support BP's argument – I'm sorry – BP's argument and BP failed to present any new evidence that there was anything modifying the contract as –

THE COURT: But that never got to trial. We never heard – some of these never got to trial. It was done early on strictly on the pleadings on summary judgment. And the others, the defense never got to put their case on.

MS. FROST: I hear you, your Honor. We would just like a ruling on Paragraphs 8 and 9 if that's your Honor's feeling.

THE COURT: All right. Let me read it.

See, what you are doing, you're having me comment up and down on the whole law here as to what I heard in the [1085] trial; and I'm not making that determination. If it has to be made later, it will be made by somebody else. But, anyhow, you're tendering – all right. What are you withdrawing? One – one through what?

MS. FROST: We're not withdrawing anything.

THE COURT: Okay. Then it's all struck. Your objection is sustained. Defense objection is sustained.

MR. RECH: I was just going to say we'll object to all that as baggage, your Honor. It's just not necessary.

THE COURT: Sustained. It's out.

MS. FROST: So, your Honor –

MR. SOLTERO: Are we going to have a definition on age discrimination?

THE COURT: We'll see.

MR. SOLTERO: Okay.

THE COURT: We'll see. Don't you have it? Don't you have –

MR. SOLTERO: That's what this is.

MS. FROST: This is our age discrimination –

THE COURT: That's your instruction on age discrimination?

MS. FROST: Yes, your Honor.

THE COURT: What do you have? Do you have an instruction on age discrimination?

MR. COVELER: I do, your Honor.

* * *

[1116] agree to or as close to it, you know, as what's in the pattern.

Where are we now? Number 6?

MS. OATHOUT: Six, seven and –

MS. FROST: Yes, your Honor, Number 6 on Page 15.

THE COURT: Number 6.

MR. COVELER: Right. Six is okay; but, your Honor, we would – 6 is the same?

MR. RECH: It's from the PJC.

MR. COVELER: I think we're looking at it –

MR. RECH: On Page 15.

MR. COVELER: We've got a different –

THE COURT: We're at the bottom of Page 177.

MR. COVELER: Your Honor, Number 6 is correct; however, we believe that Number 6 is an incomplete statement of the law. And defendants would propose Instruction Number 7 in its place. The first sentence is identical to plaintiff's tender – or Plaintiffs Proposed Paragraph 6.

THE COURT: Tender 7 is denied.

Unless you want to accept it.

MS. FROST: No thanks.

THE COURT: What's next?

MS. FROST: We would just like to get your ruling on 8 and 9. I know what it's going to be. We just want to get it on the record.

MR. SOLTERO: It's basically a restatement of the [1117] Fifth Circuit. And your Honor already said that that's not coming in under the ADEA, but we want to have it in the record.

THE COURT: Okay. Let me just read. You can argue 8 and 9, but I'm not putting it in. So, your tender of 8 and 9 is refused.

MR. COVELER: Your Honor, we have some – three additional proposed instructions with regard to the Title VII piece. The most important of those, I would say –

THE COURT: Where did you get them?

MR. COVELER: Well, Number 8, your Honor, is 11.11.1 of the PJC. This is so – you'll recall that under the ADEA there is no longer any rebuttal issue. But under the Title VII cases, we would still have the opportunity to rebut the question of whether or not race was a motivating factor and whether or not we have proven that BP would have made the same decision even if it had not considered Mr. Tratree's race.

MR. RECH: Just give it to him.

MR. COVELER: The first piece, your Honor, is –

THE COURT: Hold it. Let me just read it, the predicate –

MR. COVELER: Sure.

THE COURT: All right. What's your position on that?

MR. SOLTERO: Your Honor, I don't remember if this is in the joint pretrial order or not but –

MR. COVELER: It is. It is. It comes from our

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILLY RAY TRATREE	:	H-03-CV-954
vs.	:	HOUSTON, TEXAS
	:	JUNE 22, 2009
BP (NORTH AMERICA) PIPELINES, INC.	:	1:17 P.M.
	:	
	:	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE
DAY 6 OF 7

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[1232] THE COURT: You've used 29 and a half minutes.

MR. SOLTERO: Almost right on 30, Judge.

THE COURT: Almost right on 30. I don't have to give you that warning.

Ladies and gentlemen, take a look at your watch. I now have about 25 to 3:00. We'll be back – let's be back and wrap it up at a quarter to 3:00, ten minutes.

THE CLERK: All rise.

(Recess was taken from 2:36 to 2:52 p.m.)

THE COURT: All right. Let's call the jury in, please.

THE CASE MANAGER: All rise for the jury.

(Jury present)

THE COURT: Thank you. Be seated.

All right. We'll now we'll hear from the defendant.

You've got 40 minutes. Go right ahead.

MR. RECH: Thank you, your Honor.

May it please the Court, ladies and gentlemen of the jury.

Last Monday Ms. Oathout told you that this case was about personal responsibility. She was right then, and she's right now. Mr. Tratree decided not to sign his bump sheet. We don't know why. We'll probably never know why. It wasn't anyone at BP that caused him not to sign his bump sheet,

* * *

[1249] on June 26th; three faxes on July 5th; three faxes on July 15th; a fax on July 6th; and four faxes on July 30th. I don't know what was being faxed to Anadarko, but it looks to me like Mr. Tratree is looking to fill out a Texas Workforce Commission log and not looking for a job. And that's the log that has to be filled out so you can collect unemployment.

I get that, but it doesn't mean he was looking for work. He effectively retired. And that's consistent with the handwritten note that was up on the screen when we were in trial, that said, "If I have to move to Houston, I just might have to retire." So, what do we do now?

We've got Mr. Tratree here; and he has suffered, by all accounts, greatly. And we are sorry Mr. Tratree has suffered in the manner in which he did. And as proof that it is not what we intended, I offer you the phone calls of Thad Toomer, Andre Parker called, Grayson Williams asking Andre Parker to call, Frank

Torres calling again and again and again. This is not what we wanted. We expected that Mr. Tratree would execute his bump sheet just like every single other person had done before.

But this case is about responsibility, and Mr. Tratree wants millions of dollars from BP. And, so, let's talk about the discrimination claims. Let's talk about race first because the only evidence of racial discrimination in this case is the fact that Mr. Tratree is Black. That's it.

* * *

AGE DISCRIMINATION UNDER THE ADEA

1. Tratree claims that BP discriminated against him on the basis of his age by "eliminating" his position.[3]

2. BP claims that it "eliminated" Tratree's position "as part of the continuing organizational changes in the operations of BP Pipelines North America," including the decommissioning of the section of pipeline between Mexia and North Zulch.

3. It is unlawful for an employer to discriminate against an employee because of the employee's age.[5]

4. To prove discrimination, Tratree must prove by a preponderance of the evidence that age was a motivating factor in BP's decision to "eliminate" Tratree's position.[6]

5. Tratree does not have to prove that age discrimination is the only reason BP chose to eliminate his position, just a motivating reason.[7]

6. If you disbelieve the reason BP has given for its decision to "eliminate" Tratree's position, you may infer BP eliminated Tratree's position because of Tratree's age.[9]

8. You are instructed that the collective bargaining agreement ("CBA") that governed Tratree's employment with BP does not indicate that new classification employees will be favored over old classification employees when BP considers which positions to eliminate. You are further instructed that BP's argument that it has a policy of favoring new over old

classifications is not grounded in written company policy and is belied by the terms of the CBA. You are further instructed that under the CBA, senior employees in old classifications retain the ability to "bump" employees in new classifications so long as the senior employee is qualified for the position held by the less-senior employee. You are further instructed that under the terms and spirit of the CBA, BP shall not favor employees in new classifications over those with old classifications.[10]

9. You are further instructed that you shall NOT consider evidence that Tratree failed to sign the "bump sheet" as evidence that BP did not discriminate against Tratree.

ACCEPTED:
GIVEN AS MODIFIED:
REJECTED:

Date

David Hittner
United States District Judge

* * *

6. If you disbelieve the reason BP has given for its decision to eliminate Tratree's position, you may infer BP eliminated Tratree's position because of Tratree's race.[18]

8. You are instructed that the collective bargaining agreement ("CBA") that governed Tratree's employment with BP does not indicate that new classification employees will be favored over old classification employees when BP considers which positions to

eliminate. You are further instructed that BP's argument that it has a policy of favoring new over old classifications is not grounded in written company policy and is belied by the terms of the CBA. You are further instructed that under the CBA, senior employees in old classifications retain the ability to "bump" employees in new classifications so long as the senior employee is qualified for the position held by the less-senior employee. You are further instructed that under the terms and spirit of the CBA, BP shall not favor employees in new classifications over those with old classifications.[19]

9. You are further instructed that you shall NOT consider evidence that Tratree failed to sign the "bump sheet" as evidence that BP did not discriminate against Tratree.

ACCEPTED:
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REJECTED: